

SOUTH AFRICA / JUDGMENT

Sephai v Barloworld Transport (Pty) Ltd (JS411/16) [2021] ZALCJHB 446 (14 December 2021) [2021] ZALCJHB 446

COURT

Labour Court Johannesburg

BEFORE

S Mabaso

CASE / FILE NUMBER

JS411/16

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: JS 411/16

In

the matter between:

PETER

PHELEFU

SEPHAI Applicant

and

BARLOWORLD

TRANSPORT (PTY)

LTD Respondent

Trial

dates: 31 May 2021 to 02

June 2021

Delivered: 14

December 2021

Summary: Strike

related dismissal - onus of proof vs evidential burden in the strike

related dismissal- probability and credibility of witnesses

–

uncontested evidence –mitigating and aggravating circumstances.

JUDGMENT

MABASO, AJ

Introduction

- [1] The central question in this unfair dismissal matter is about the difference between onus of proof and evidential burden on parties in an unprotected strike dismissal dispute, as the Barloworld Transport Solutions (Pty) Ltd (the Respondent) contends that Mr Peter Phelefu Sephai (the Applicant) failed to present his services as required by his contract of employment, so he had the burden to show that he had a valid reason to be absent from work. It was common cause that the Respondent was a hotbed, between 27 and 31 August 2015 and 02 September 2015, as all its drivers were involved in the unprotected strike, and the Respondent contends that the Applicant was part thereof. On the contrary, despite not disputing an unprotected strike, the Applicant testified that he was not involved as his manager (Mr Makhalima) permitted him to be absent from work.
- [2] The Applicant seeks an order to declare that his dismissal was both procedurally and substantively unfair and asks for maximum compensation.

The pleadings and viva voca evidence:

The Respondent's case

- [3] The Respondent dismissed the Applicant following allegations of participating in the unprotected strike. A mass disciplinary enquiry preceded the dismissal, where about 82 employees, including the Applicant, appeared before a disciplinary chairperson (the Chairperson) who concluded that all were guilty of the charges levelled against them. The cause for the strike was that some of the employees were not satisfied with the way the employer remunerated them. The Applicant was one of the drivers. None of the drivers rendered services during the strike.
- [4] Ultimata were issued to all employees advising them to report for duty; only one employee, Mr Sam Mlambo (Mr Mlambo), complied with the ultimata. The drivers did not report for duty on 29 August 2016 or on 30 August 2016, save one Mr Jacobs Kobus Booyens (Mr Booyens) who stated that he wanted to work but was scared, then returned home. On 31 August 2016, no one reported for duty. The Applicant did not attend work on all these dates.
- [5] The Respondent's management kept records of all phone calls and happenings of the strike, referred to as the Strike-Diary. Other employees called their respective managers, advising them that they could not work due to a violent strike; for example, Mr Booyens phoned Mr Makhalima about this. The Applicant's name was not registered as one of the employees that phoned.

- [6] SATAWU officials (SATAWU) represented all employees appearing in annexure “A”, of the Chairperson’s outcome, during the disciplinary hearing and the Applicant is one of them. The Applicant was present during the disciplinary hearing. The Chairperson inquired about representation; the response was that all the employees had agreed that SATAWU was to represent them. The Applicant did not testify during the disciplinary hearing nor object to him being part of the strike. Both parties submitted mitigating and aggravating factors. The strike was violent, and the Respondent lost millions of rands.
- [7] There was no attempt by “the union” or employees to comply with the provisions of the Labour Relations Act[1] (LRA). The interpreter, Mr Mavundla, interpreted in IsiZulu and Setswana. Neither of the employees present during the disciplinary hearing advised the Chairperson nor the Respondent’s representatives that they did not understand the process.
- [8] Mr Makalima was the Applicant’s direct Manager. When the strike started, management agreed that a Strike-Diary should record all calls received from employees who could not attend work. If the Applicant had contacted Mr Makalima, such call could have been recorded in the Strike-Diary. The Applicant participated in the strike. Notifications were sent to all the employees, including the Applicant, to report for duty, but none complied.

The Applicant’s case

- [9] He denies participating in the strike. He confirmed that on 27 August 2016, he reported for duty and attended a safety meeting around 6am and alleged that when “they” wanted to take their loads, they were “told to leave the premises of the Respondent”. He went out of the premises and called Mr Makalima to inform him about the strike, and the latter responded by advising him to wait there for a while, and he complied with this directive until around 4pm. Thereafter he returned home. The following day again, he called Mr Makalima. On 30 August 2016, he returned to the workplace to “just observe the situation to see what was going on.” He again called Mr Makalima, who said he should go back home, as he would inform him once the situation was normal.
- [10] He Further denied receiving the ultimata. The drivers indicated that they would not work because of remuneration issues. They told them they could not work too and should leave the premises, and he complied. He further testified that he listened to them because he was frightened and concerned about his safety. The reason for him to attend the disciplinary hearing, was after being advised by one of his colleagues. The Applicant averred that he did not understand what was happening in the disciplinary hearing because he speaks Setswana, and the proceedings were conducted in English and IsiZulu. Mr Mavudla tried to interpret in Setswana but was not eloquent.

The law and analysis

- [11] The evidence showed that there was a strike that did not comply with the provisions of Chapter IV of the LRA; it was uncontested that it remained violent as two trucks were torched. It was common cause that the Applicant did not tender services on the mentioned dates and that, as a result, he was dismissed following the disciplinary hearing.
- [12] In terms of section 192(2) of the LRA, the Respondent must prove that the dismissal was fair. This Court is required to consider the relevant Code of Good Practice on dismissal. Consideration is also on the evidential burden, meaning who is supposed to give reasons for failure to tender services, this Court in *Food and Allied Workers Union and Others v Earlybird Farm and Another* (JS1076/2013) [2019] ZALCJHB 1, relating to this issue, held thus:

“As the action of the individual applicants is an unlawful withdrawal of services that they were employed for, it is therefore up to the employees to give an explanation for their unlawful conduct.”

Cf. *Transport and Allied Workers Union of South Africa obo Ngedle and others v Unitrans Fuel and Chemical (Pty) Ltd* 2016 (11) BCLR 1440 (CC) in para 46.

- [13] The Applicant, on his version, confirmed that on 27 August 2016, he reported for duty but did not work as he left the premises following the meeting, meaning he withdrew his services to the Respondent, and he confirmed that on all the dates, he did not work. Counsel for the Respondent, Mr Baloyi, submitted that the Applicant, a person raising a defence, had a burden to present evidence and call Mr Makalima. On the contrary, the Applicants representative argued that the Respondent had the onus of proof to show that the Applicant did not report to Mr Makalima, so the latter should have been called by it. As indicated in the preceding paragraph, the Applicant had an evidential burden relating to this issue, and that does not mean the

onus of proof moves to the Respondent, because the latter still has to show that dismissal was fair. There is always a difference between the onus of proof and evidential burden, cf. *DB Contracting North CC v National Union of Mineworkers & Others* [2015] 10 BLLR 973 (LAC) (*DB Contracting North*) at para 75, and recently the SCA judgment *Jugwanth v Mobile Telephone Networks (Pty) Ltd* [2021] 4 All SA 346 (SCA) at para 6.

- [14] I now proceed to interrogate this issue. The Applicant's version is that Mr Makalima excused him following the strike that commenced on 27 August 2016. According to his testimony, the Applicant phoned Mr Makalima in the morning, and the latter advised him to wait for a while. He waited there for about 10 hours. He explains that he did not attend to the area on the subsequent days as he was concerned about his safety, but on 31 August 2016, he did go there. Mr Baloyi for the Respondent argued that this version should be rejected as it is highly improbable considering that the witnesses for the Respondent testified that there was the Strike-Diary where they noted all calls about employees that reported the challenges that they faced regarding reporting for duty and if he had reported the incident, such would have been noted as one of the employees reported the incident to Mr Makalima; Mr Makalima was not called so adverse inference should be drawn against the Applicant on this issue. The Applicant responded that Mr Makalima whereabouts were unknown as he is no longer

employed by the Respondent.

- [15] This point permits more than one inference, which is that it is possible that indeed Mr Makalima was phoned by the Applicant but forgot to notify the scribe of the Strike-Diary, and that it is possible that the Applicant did not report to Mr Makalima since there was no recording in the Strike-Diary as per the Respondent's witnesses. I conclude that the probabilities favour the Respondent taking into account the totality of the evidence presented before this Court; I deliberate forthwith. What works against the Applicant mostly are what is contained in the following paragraphs, 16 to 19.
- [16] The Applicant did not raise this defence during the disciplinary hearing (i.e. explain more below about the disciplinary hearing), which was one of the opportunities available to him to raise it, and does not provide a plausible reason why he did communicate from the beginning that Mr Makalima had authorised his absence. During the cross-examination, when he was asked why he did not call Mr Makalima to testify on his behalf during the disciplinary hearing, he answered that he tried to call him but did not answer his phone. In this part of evidence clearly the Applicant did not instruct his legal representative to put to the Respondent's witnesses that he wanted Mr Makhalima to clarify this during the disciplinary hearing; he mentioned this critical point for the first time when he was cross-examined. I mention this aspect because the Applicant's case has been that he did not understand what was going on in the disciplinary hearing because of the language used now the unanswered two-fold question is: why did he try to call Mr Makalima on the date of the hearing, and if he had not chosen SATAWU to represent him, why did he attend the disciplinary hearing.
- [17] Mr Baloyi asked why the Applicant in the referral to this Court, which was done less than a year following his dismissal, did not state his defence about Mr Makalima. The Applicant, in his response, was very coy and ended up saying, "I cannot recall much about 2015". When put to him that the reason for him to include the issue of Mr Makalima in the pre-trial minutes, which was finalised in 2018, was that he knew that Mr Makalima was no longer working for the Respondent, he provided no answer.
- [18] I must indicate that Rule 6 of the Rules of this Court provides that an applicant must indicate background facts to be relied upon in a statement of case. This is when an applicant, such as the Applicant, will be expected to detail his defence unless disciplinary records are to be submitted and relied upon during the trial contain this defence; I say this because this Court is required to take into account the totality of the case properly presented before it. In this matter, the Applicant did not do that; therefore, the only inference that one can reasonably draw is that indeed this defence was an afterthought, as suggested by the Respondent and that if the Applicant had informed Mr Makalima, the strike diary would have reflected.

[19] Furthermore, suppose that Mr Makalima had advised the Applicant to remain at home due to safety concerns. In that case, an unanswered question is why did the Applicant would proceed to the Respondent premises on 30 August 2015 because he would have remained home as Mr Makalima had authorised him. Furthermore, if indeed the story of Mr Makalima was correct, the Applicant would have stated same in the statement of case. So clearly, this was an afterthought.

[20] Consequently, the finding of guilty regarding the charges levelled against the Applicant by the Respondent cannot be disturbed.

[21] It was not disputed that the strike was violent, that two tracks were torched, that the Respondent lost millions of rands due to the five-day strike. As the Applicant has unlawfully withdrawn his services to the Respondent, that does not mean a dismissal is

automatic. This Court must further investigate the requirements, as contained in item 6(1) read with item 7 of the Code of Conduct

promulgated in terms of the LRA.[2]

[22] The uncontested evidence was presented to the effect that no attempt was made by the striking employees, including the Applicant, to comply with the provisions of the LRA. There was also no unjustifiableness on the part of the Respondent which was presented.

[23] As much as it was put to the Respondent's witnesses that the Applicant was not a member of SATAWU. Mr Kobus testified that the notification was sent to all the drivers, including the Applicant; however, the Applicant disputed receiving the notification. Both the witnesses of the Respondent presented evidence that ultimata were issued. Mr Kobus confirmed that he issued ultimata, and the final one was advising the striking employees to report for duty the following day, but only Mr Mlambo did. Considering that the Applicant has shown to be an untruthful witness throughout, I accept that he was issued with the ultimata. In argument, the Applicant's legal representative stated that the addressee in the ultimata was not the Applicant. I agree with him but what is essential is the message in the ultimata which called upon the employees to return to work.

[24] Relating to the disciplinary hearing, the witnesses of the Respondent presented uncontested evidence that all the drivers had a meeting and agreed that they were to be represented by SATAWU. It is common cause that the Applicant did not raise concerns during the disciplinary hearing. The Applicant put a version to Mr Kobus that "he did not know what was happening in the DC". This witness responded by saying the Applicant was aware. Initially, the Applicant stated that the proceedings were conducted in English and IsiZulu only. However, during cross-examination, he changed from English to IsiZulu and Setswana, however alleging that Mr Mavundla's Setswana was poor. This clearly shows that the Applicant's version goes

along to suit the question that he was being asked. So, I conclude that the Applicant version should be rejected as false, and the Respondent's witnesses be accepted as truthful.

[25] I, therefore, conclude that the disciplinary hearing that was held involved the Applicant, and SATAWU represented him as his chosen representative.

[26] I have considered the personal circumstances of the Applicant as presented during the trial; vis-a-vis the Respondents aggravating circumstances in that the strike lasted for five days, it was violent, and the property was damaged. I conclude that the aggravating circumstances outweighed the Applicant's circumstances as up to the end of the trial, there was no valid reason for the strike to proceed and why the employees did not follow the processes provided for in the LRA.

[27] Consequently, this Court makes the following order.

Order

1. The dismissal of the Applicant by the Respondent was both procedurally and substantively fair.
2. Each party bear their own cost.

Sandile Mabaso

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr

C G Grove

Instructed by: Grove

Attorneys

For the First Respondent: Adv F Baloyi

Instructed by: Poswa

Inc. Attorneys

[1] Act 66 of 1995, as amended

[2] Schedule 8 Code of Good Practice: Dismissal [amended by s. 57 of Act 42 of 1996 and by s. 56 of Act 12 of 2002]

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Prepared on 23 October 2026 · Esheria