

SOUTH AFRICA / JUDGMENT

Steel Mining And Commercial Workers Union and Others v S P Cleaning Services CC (J1405/97) [1999] ZALC 164 (18 November 1999)

[1999] ZALC 164

COURT
Labour Court

BEFORE
B M Jammy

CASE / FILE NUMBER
J1405/97

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IN THE LABOUR COURT OF SOUTH
AFRICA
HELD AT
JOHANNESBURG
CASE NO J1405/97

In the matter between: STEEL MINING AND COMMERCIAL
WORKERS UNION First Applicant
HENDRIK MOELA AND
OTHERS Second and further Applicants
and
S P CLEANING SERVICES
CC Respondent

JUDGMENT

JAMMY AJ

1. The Applicants in this matter were part of a larger group of employees of the Respondent who were dismissed on 29 August 1997, allegedly for participating in an illegal and unprotected strike and their refusal to comply with successive ultimatums from the Respondent to return to work. They contend that they were not on strike and that their subsequent dismissal was unfair. They seek reinstatement or compensation.

2.THE APPLICANTS' EVIDENCE

Mr Hendrik Moela, the principal witness for the Applicants, was a shop steward. There was in existence at the time, an agreement between the Union and the Respondent in terms of which the Respondent had undertaken to effect payment of the salaries of its employees by payment into their bank accounts "one or two days before the last working day of every month." The last working day of August 1997 was the 29th, a Friday. Pursuant to the agreement therefore, the employees' salaries should have been available to them on that basis by the 27th or 28th of that month. On the morning of the 28th however, and on their way to work, a number of the Applicants had endeavoured to withdraw their money through Automatic Teller Machines, only to find that it was not yet standing to their credit. During their lunch break the same day (12.30 pm to 1 pm), they again visited the bank, only to find that their wages had apparently not yet been paid. Rather than returning to work at 1 pm therefore, the workers held a meeting to determine what course of action they should take in the face of this apparent breach by their employer of the agreement in question. It was resolved that Mr Moela should go to the office and request his supervisors to telephone the owner of the company, Mr S Pogorelsky, and request him to come to the premises where they were working and explain to them why their wages were not available.

3. The telephone call was made and he was then informed by the supervisors, said Mr Moela, that Mr Pogorelsky had stated that he had nothing to say to him. He reported this to his fellow employees and was directed to return to the supervisors and ask them to telephone Mr Pogorelsky again and ascertain, once again, why they had not been paid and why he was not prepared to discuss the matter with them. The situation was exacerbated, said Mr Moela, by the fact that certain of the employees had applied for and been granted short periods of leave and required their money before they left.
4. The second call was duly made and Mr Pogorelsky's refusal to meet with the employees repeated. In addition, on this occasion, he apparently intimated that he would now charge interest on monies loaned by him to various employees and that the leave granted would be regarded as unpaid.
5. At his request, said Mr Moela, the supervisors wrote down what Mr Pogorelsky had told them and he took this back to the employees who, for a third time, instructed him to go back and request the supervisors to telephone Mr Pogorelsky again with the same request. On that occasion however, and before a further call was made, the supervisors informed him that Mr Pogorelsky had telephoned his union, and that the union's instructions were that "they should leave the premises." They did not do so however and waited until "knock-off" time in case Mr Pogorelsky arrived. He did not however do so.

- 6.The workers returned the following morning, donned their uniforms and, said Mr Moela, went to the office where they normally sign on, but found it locked. The union organiser was however present and a meeting with the owner then ensued. What then occurred, Mr Moela testified, was that having been told by the organiser that the workers had reported for duty, he indicated that they were not to work that day. They were handed their pay slips and told to return on the following Monday.
7. On that day, 1 September 1997, they again arrived at their workplace, donned their uniforms and proceeded to the office to sign on only to find, once again, that it was locked. Mr Pogorelsky was present and informed them that they were to return all their working material. Their electronic access cards were taken back and they were informed that their services had been terminated the previous Friday and that they could now "do what you want."
8. He enquired of Mr Pogorelsky, Mr Moela testified, how the dismissal had been effected since no written notice thereof had been handed to the employees. They were informed that no further notice was necessary and that if they refused to leave the premises, the Police would be summoned. They remained where they were however, and when the Police, who were then called, eventually arrived, they commented that they had been informed by the owner that the workers had been dismissed. Their response, said Mr Moela, was that whilst the dismissal the previous Friday was not disputed, they required written notification thereof and the return of their UIF cards. The response from the Police was that if they wished to do so, they should "open a case" and they then left the premises with that intention.
9. In the course of comprehensive cross-examination by Mr S Snyman, representing the Respondent, Mr Moela was adamant that the workforce had not embarked upon a strike. They were not refusing to work, he said, - all they wanted was "for the owner to come and explain why we had not been paid by 11h00 on 28 August in terms of an agreement of undertaking by the owner to do so." When it was put to him that that allegation had not been raised either in the pleadings or in his evidence in chief, Mr Moela responded that the undertaking had been given some days previously.
- 10.It was correct, Mr Moela acknowledged, that the workers had not commenced work at 1 pm on 28 August. They were waiting for a report-back, he said, and continued thereafter to wait for the owner to come to the premises and explain why they had not been paid.
- 11.Mr Moela was then referred to three written ultimatums, each of which was in substantially the same terms, recording the employer's perception that the work stoppage in which they were engaged constituted an unprocedural and unprotected strike, calling upon them to resume their normal duties forthwith and advising them that if the ultimatum was not complied with within one hour, they would "expose themselves to the sanction of dismissal." Each of these ultimatums concluded with the words "By order of Management," the time of issue of the first of them being recorded as 13h30, the second as 14h30 and the third, at 15h00, in this instance however, calling upon the employees to return to work at 07h30 on 29 August 1997.

12.He had not seen these ultimatums before, said Mr Moela. What occurred on the afternoon of the 28th August was that he was informed that the company had telephoned the trade union and that a meeting with the trade union organiser had been arranged for the following morning. They assumed that the issue would be resolved at the meeting scheduled for that time.

13.At that meeting, Mr Pogorelsky, his Industrial Relations Adviser, the Union Official and he himself were present. Nothing was discussed. As soon as they arrived, said Mr Moela, they were given their pay slips and told to go and return the following Monday. They understood that the reason for this was that they would then receive their outstanding documents and money. He was present during all discussions between the Union Official, Mr Mandla, and Mr Pogorelsky but had not heard Mr Mandla report that the workers refused to listen to him or to his recommendations that they should return to work.

14.Ms Agnes Khwababa, the next witness for the Applicants, corroborated Mr Moela's evidence in all its material respects. They had not received notices of termination of their employment, she said, but on 29 August had simply been told that they should leave. She had never seen the three ultimatums allegedly issued on 28 August, she stated.

15.THE RESPONDENT'S EVIDENCE

Mr Shelton Pogorelsky is the managing member of the Respondent close corporation which, he testified, carries on the business of a contract cleaning company, providing cleaning services to commercial and industrial clients at their own premises. The Applicants in this matter were, at the time of their dismissal, employed at Spartan on the East Rand, performing cleaning services for Auto Industrial, a contracted client of the Respondent.

16.On 28 August 1997 at approximately 1 pm he received a telephone call from one of his supervisors at the site to the effect that the employees there were refusing to continue with their normal duties and had held a meeting. Their shop steward was demanding that all of them receive their salaries for the month immediately and that he was to attend the premises to explain why these had not been paid. He was otherwise committed however, and was unable to do so but indicated that he would take advice in the interim from the Respondent's Labour Consultants, the National Employers Forum, and revert.

17.He did so and was advised by his consultants that the proper procedure was to issue ultimatums to the employees in appropriate terms and that they, the consultants, would attend to the drafting and submission thereof.

18.Shortly thereafter he received a second telephone call from the supervisor who put the shop steward, Mr Moela, on the line. Mr Moela stated that "the people wanted their salaries immediately" and that he was to come to the premises to discuss the matter. He explained that he was unable to do so but that the employees should continue working and he would "sort out the situation" as soon as possible. This was rejected.

19. Since 1985, said Mr Pogorelsky, employees' salaries had always been paid by direct deposit of the aggregate amount thereof to the First National Bank which in turn appropriated the amounts due to the individual employees to their respective bank accounts. No payments were ever made on site and the employees were fully aware of this procedure.

20. He had been informed by his consultants that the staff should receive three ultimatums which, if all were ignored, would entitle him to dismiss them. That was not his intention however. He had always had a good relationship with his employees and had no doubt that, with discussion, the problem could be resolved. Dismissal would prejudice the company as well as the employees. It would be unable to discharge its cleaning contract with its customer and would suffer a concomitant loss of income.

21. He decided therefore, whilst the ultimatum procedure was being followed, to telephone the union office. His relationship with the trade union had similarly been a good one and he had been invited to communicate with them if he ever had a problem. He advised the union what was occurring and it was arranged that a union representative would meet him, his Labour Consultant, and the shop steward and employees the following morning on site. The workers had, in the meantime, refused to work at all that afternoon.

22. The arrangement that salaries would be paid within a day or two of the last working day of the month was a flexible one, Mr Pogorelsky testified. This was usually the case but on occasion, payment was made even earlier than that stipulated time. In the present instance, he had drawn a cheque and deposited it with the bank on the afternoon of 28 August. There may however been some administrative delay within the bank, in designating and transferring specific amounts to the individual accounts of the employees.

23. The scheduled meeting was held at 7 am on 29 August. The shop steward and the employees were informed by his consultant that they were participating in an unjustified and unlawful strike. The workers became aggravated and irritated and the union representative, Mr Mandla, then requested an additional half hour in order to discuss the matter with them. He returned at 8 am to advise that he had urged the workers to return to work, but that they refused to listen to him and that there was nothing further that he could do. On the advice of his consultant it was then decided that they should be informed that they had been dismissed.

24. As a result of these events, Mr Pogorelsky concluded, the Respondent had been obliged to recruit replacement staff, who were inexperienced and had to be trained in the cleaning process, and as a consequence, lost two full days income and was able to preserve the contract in question only with difficulty. He did not believe that he had been left with any alternative other than to dismiss the employees concerned. He had never had any previous problem regarding the payment of wages in the manner in which this had now been done and had received no prior warning of the industrial action upon which the employees had embarked and which had come to him as an absolute shock.

25.The events on 28th and 29th August as described by Mr Pogorelsky, were confirmed by Mr J H Schoeman, one of the supervisors at the Spartan site at which the Applicants were employed. The form of ultimatum drafted by the Respondent's Labour Consultants was faxed through to the supervisors shortly before 1.30 pm on 28 August, a deadline of 2.30 pm was inserted, copies were made and the supervisors then attempted to hand a copy to the shop steward and to each of the employees involved. All of them however refused to accept them or to read them. "They would not even look at them, so we told them what they were."

26.A second ultimatum, with an extended deadline of 3.30 pm was issued at 2.30 pm in the same manner and with the same result and eventually, at 3.30 pm they were instructed to issue a third ultimatum, requiring the employees to commence work at 7.30 the following morning. Once again, the employees refused to accept or read it.

27.No work whatsoever was done on the afternoon of 28 August and he was present the following morning, said Mr Schoeman, when, after further discussion, the union representative, Mr Mandla, informed them that the employees refused to listen to him and return to work. At no time, since the work stoppage at 1 pm the previous day, had any of these employees tendered their services or offered to return to work. They were accordingly informed that their services had been terminated and were instructed to return their uniforms and access cards on the following Monday morning.

28.CONCLUSION

It is not clear from the evidence presented in that regard, and indeed there is some dispute, as to exactly when the wages of the employees concerned became available to them. Mr Pogorelsky's testimony that payment of the aggregate amount thereof was made to the bank on the afternoon of 28 August is, on the face of it, contradicted by a letter from the Respondent to the bank and enclosing the cheque in question, which is dated 29 August 1997. That letter, Mr Pogorelsky attempted to explain, was in fact post-dated, and he remained adamant that the amount was physically paid in the previous afternoon.

29.Whether or not that was the case however, Mr Pogorelsky's testimony that the arrangement that salaries would be paid within a day or two of the last working day of the month was flexible and loosely applied, was not materially challenged. Of significance in that context, is the fact that the work stoppage, which I am left in no doubt commenced at 1 pm on 28 August 1997 and continued unabated thereafter, was an apparent reaction to the inability of the employees concerned to obtain access to their monies the previous day and that morning.

30.Both in the course of the submission of evidence and again in his closing argument, Mr E Thenga, representing the Applicants, submitted that the Applicants were at no time demanding to be paid. What they consistently required, he stated, was that the owner of the company attend at the site where they were working in order to explain why the money was not available. In that context, he contended, they were not involved in strike action. They simply wished to talk to their employer before proceeding with their work and what in fact had happened, was that, by locking the office where they would ordinarily have signed on, their employer was in fact implementing

an unprocedural lock-out.

31. There is, in my view, no substance or validity in that submission. Apart from the allegation that the employees attempted to sign on on the mornings of 29 August and 1 September 1997, there is nothing in the evidence before me to indicate that they made any other attempt to commence work or in any other manner to tender their services. On the contrary, the consistent stand taken by them and conveyed by their shop steward, was that they would not do so unless and until their employer attended at the premises to provide the explanation which they required.

32. A "strike" is defined in Section 212 of the Labour Relations Act 1995 as -

"..... the partial or complete concerted refusal to work, or the retardation or obstruction of work, for the purpose of remedying a grievance or resolving a dispute....."

33. I am left in no doubt that that is precisely what occurred on 28 and 29 August 1997 and there can equally be no possible suggestion that the work stoppage in question was either lawful or protected in the context of Section 64 of the Act. The question that remains for consideration therefore, is whether their dismissal as a consequence of that unlawful conduct, was fair and justified in the circumstances in which it occurred.

34. I have no hesitation in accepting, on a balance of probabilities, that the three ultimatums tendered in evidence by the Respondent were produced and tendered to the Applicants in the manner and at the times described by the Respondent's witnesses. I do not believe either Mr Moela or Ms Khwababa that they had seen them for the first time in this court, although it may well be that, in the prevailing atmosphere, they refused to accept or read them at the time. They were however, according to the supervisor, told the nature and content of the documents and I have no doubt that they were aware of and understood their nature and import.

35. The insistence that Mr Pogorelsky attend at the site to explain the unavailability of their salaries, was, in my view, unreasonable. The Applicants must have been aware that the work they were doing was being performed in terms of a contract between the Respondent and its customer and that that contract and the commercial relationship which it evidenced, would of necessity be placed in jeopardy as a consequence of their actions. Their precipitate aggression appears to me to have been sourced in the unavailability of funds to individuals who were about to go on leave. That leave would however logically have commenced at the end of the working month, namely Friday 29 August 1997 and there is nothing in the evidence to suggest that the wages in question, having been paid in at the latest that morning, and on Mr Pogorelsky's version, the previous afternoon, would not have been available during the course of that day.

36. In those circumstances, the refusal to work was, in my view, unjustified and the consequences thereof exacerbated by the ostensibly contemptuous rejection of the three ultimatums properly and, in the circumstances of the matter, reasonably issued to the striking employees. I am mindful moreover, in that regard, of the further opportunity afforded to them the following morning, and through the medium of their union representative, to reconsider their position, and their absolute refusal to do so notwithstanding his intervention.

37. I have concluded therefore, that in the prevailing circumstances, the Respondent was, as Mr Pogorelsky submitted, left with no alternative, in the face of its ongoing contractual obligations to its customer, other than to terminate the services of the employees involved and to attempt to redress the situation in which it found itself by the recruitment of replacement labour as a matter of urgency.

38. In these circumstances, I am satisfied that the dismissal of the Applicants was both justified and fair and their claims are accordingly dismissed. No reason has been suggested to me why an award of costs in this matter should not follow the result and the Applicants are accordingly ordered to pay the Respondent's costs, jointly and severally. This order will not however apply to the Applicant, Agnes Khwababa, who, for reasons best known to herself, initiated an independent reference of her dispute to the CCMA, was unable to furnish a satisfactory explanation for having done so, and has accordingly been improperly joined in these proceedings.

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B M JAMMY AJ

18 November 1999

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Prepared on 13 October 2026 · Esheria