IN THE LABOUR COURT OF SOUTH AFRICA HELD IN JOHANNESBURG

Case no: JS 675\06

In the matter between:

LINAH NKOSI AND OTHERS **Applicant**

and

EGGBERGT EGGS (Pty) Ltd **Respondent**

JUDGMENT

MOSHOANA AJ

Introduction

Preliminary issues

[1] The Statement of Case was filed on behalf of the Applicants by Distributive, Catering, Hostels and Allied Workers Union (DCHAWU). This union was deregistered. An application was brought by Mr Qwesha to substitute the representation with Industrial Commercial Allied Workers Union (ICAWU). This application was not opposed. Accordingly it was so granted.

Settlement agreement

[2] On the last day of trial, the parties entered into a settlement

agreement which had the effect of reinstatement of about 11 Applicants (Applicants 29th, 21st, 49th, 59th, 72nd, 78th, 71st, 57th, 52nd, and 53rd). Accordingly, the case relevant to these Applicants shall not be dealt with further in this judgment.

Pre-trail minutes

[3] In paragraph 12 of the main minutes, it was recorded that the dismissals of Applicants 18th, 32nd, and 37th were withdrawn and they were still in the employ of the Respondent.

Background facts

[4] On or about 19 June 2006, the Applicants participated in a strike action. On or about 20 June 2006, the Applicants were dismissed. The said Applicants approach this court for a relief and all sought reinstatement. About 95 Applicants approached the court. As pointed out about fourteen Applicants had fallen out of the race for reasons set out above. It then leaves the court to deal with the dismissal of the remainder (81 Applicants).

Issues

[5] In the pre-trail minutes the following arose as common cause:

5.1. The Applicants participated in an industrial action on 19 June 2006.

5.2. Some of the Applicants were issued with notices at

approximately 16H30 on 19 June 2006, to attend a disciplinary hearing on 20 June 2006, to answer charges of:

5.2.1. Participating in illegal strike action and\or refusal to heed an ultimatum to return to work and resume their normal duties and\or

5.2.2. The disruption of the company's normal activities\operations by stopping and preventing the normal work flow through intimidation or intimidating person who want to work.

5.3. The said hearings were scheduled to start at 11H00 on June 2006.

5.4. The Applicants were dismissed on 20 June 2006.

[6] The following appeared as issues in dispute:

6.1. The Applicants participated in a strike action on the 20th June 2006.

6.2. There were ultimatums issued and the number thereof to the Applicants.

6.3. That the industrial action was a protected industrial action in terms of section 65 of the Labour Relations Act.

[7] The following issues required determination by the court:

7.1. Whether or not the Applicants participated in an unprotected strike?

7.2. Whether or not the termination of the Applicant's services was substantively fair?

7.3. Whether or not the termination was procedurally fair?

7.4. What relief in any are the Applicants entitled to?

Evidence

Documentary evidence

[8] The parties handed up a bundle of documents which was conveniently marked bundle A. In terms of the pre-trail minutes, the following was agreed with regard to the documents in bundle A:

> "unless specific objection is raised at the outset of the trail, and subject to the right of the parties to inspect the originals of all the documents, the parties admit that the documents contained in the bundle are what they purport to be, but reserve their rights to challenge the truth of the contents of such documents".

The Respondent also introduced 18 sets of photographs and were marked Exhibit A. Later in the course of the evidence of Johannes Rasekhula, Exhibit B was introduced. The Respondent accepted the duty to begin. It did so by calling four witnesses, namely Stefan Cloete, Erdi Neitz, Gawie Rossouw and Dirk Engelbrecht. It is not the intention of the court to deal with the evidence of each in any detail since in the court's view the pertinent issue (ie did the Applicants participate in strike action?) is common cause. It is common cause that on 19 June 2006 the Applicants participated in an industrial action.

[9] All of them testified about the incidents of the 19th and 20th to the extent that they were present. Mr Neitz for an example was the first

person to deal with the action and had meetings with the Applicants and the shopstewards. He testified that the demand was the reinstatement of Palaza (a dismissed employee). He refuted allegations that he spoke badly with the employees. Mr Cloete amongst others confirmed that the ultimatum (P1—5 bundle A) issued by Neitz were drawn with his assistance. He testified about meetings with shopstewards, their refusal to attend hearings and the hearings themselves. Mr Gawie Rossouw amongst others testified that he took the photographs (Exhibit B). He also confirmed the incidents captured in those photographs. Mr Engelbrecht, corroborated the evidence of the others. He confirmed that this court issued an interdict as a result of the strike action.

[10] The Applicants called five witnesses. Namely, Zandisile Mdhleleni, Piet Roman, Xolani Figlan, Thomas Sekhula and Johannes Rasekhula. Save for the testimony of Thomas Sekhula, the court was far from being impressed with the testimony of the rest of the Applicants' witness. The Applicants' witnesses contradicted themselves on material aspects, they refuted their Statement of Case on various occasions. Mr Mdhleleni is the one who manufactured an allegation that Mr Neitz said amongst other things "fok off". When challenged that the said allegation was not made in the Statement of Case he sought to refute the Statement of Case. Mr Roman refuted that ultimatums were issued. In his testimony only 3 ultimatums were issued, he read 2 and explained the contents thereof to the Applicants. In all those ultimatums he understood them to convey the cause that the Responded intended

to take if they did not return to work. He confirmed that page 3 of the bundle A was amongst the "papers" given to him. Coincidentally, this being the ultimatum at the back of which one Dumisani wrote the demand and gave to Mr Neitz. He sought to dispute the contents of that note (P6 of A) which clearly spells out their demand being the reinstatement of Palaza. He testified that the demand of reinstatement was abandoned. He knew that Palaza can seek reinstatement either by way of an appeal or referral to the CCMA. He disputed meetings with management. He sought to call them discussions (whatever that means). He did not go to the venue for his hearing at 11H00. Mr Figlan somewhat in a feeble manner attempted to corroborate the version of Mdhleleni and Roman that the demand was an apology from Neitz for words allegedly uttered by him. He disputed that he agreed with Mr Cloete that the Applicants were wrong in their action. However, he assisted in the distribution of outcomes of the hearing. He testified that he did not know that there was a strike until he got to the premises of the Respondent. Johannes Rasekhula testified that he was called back by the Respondent. He is paid daily for that work, when prior to his dismissal he was paid monthly.

Argument

[11] Adv Charoux for the Respondent argued that the dismissal was fair and was effected after a fair procedure. She argued that the Application should be dismissed and costs should follow the results. Mr Qwesha argued that the dismissal is unfair both procedurally and substantively and the Applicants should be

reinstated. There must be no order as to costs.

Analysis of evidence and argument

[12] The court does not hesitate to state that the evidence of the Respondent's witnesses was straightforward and ought to be preferred over and above that of the Applicants' witnesses. The court rejects the evidence that Mr Neitz uttered the words testified about by the Applicant's witnesses. The court accepts that the only demand persisted with throughout was that of reinstatement of Palaza. I accept that the note on page 6 of bundle A, was written by Dumisani and given to Mr Neitz. The contents are consistent with the demand persisted with throughout. The court further accepts that the shopstewards did indicate that they and the Applicants would not attend hearings.

Did the Applicants participate in the strike action on 20 June 2006?

[13] Uncontested evidence before court is that the Applicants were suspended on 19 June 2006. The effect of a suspension is that they are not supposed to perform their duties. The notice to attend a disciplinary hearing bore the following at the bottom:

> "You are hereby suspended from work on full pay pending the outcome of a disciplinary hearing into the matter". (my underlining)

A strike is defined as a partial or complete concerted refusal to work, or the retardation or obstruction of 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 the definition includes overtime work, whether it is voluntary or compulsory. (my underlining)

[14] Having regard to the definition the court is of the view that there was no refusal to work as the Applicants were suspended. However, given the evidence led, (placing of tree stumps on the road) the Applicants definitely obstructed work on 20 June 2006. Accordingly they were on strike. Nonetheless, the evidence of Neitz was that the Applicants were dismissed for the events of the 19th and 20th. The Applicants were indeed on strike on 20th June 2006.

Were the ultimatums issued and the number thereof?

The court is satisfied that there were ultimatums and five such ultimatums were issued. The evidence of Roman is thus rejected that only three ultimatums were issued.

Was the industrial action protected?

The industrial action on both days was unprotected. Section 65 of the Labour Relations Act limits participation in a strike action if the issue in dispute is one that a party has the right to refer to

arbitration or to the Labour Court in terms of the Act. The issue in dispute is defined as in relation to a strike or lockout, the demand, the grievance or the dispute that forms the subject mater of the strike. The question in this matter then becomes is the demand of reinstatement of Palaza an issue that the Applicants have a right to refer to arbitration or to the Labour Court in terms of the Act. In the court's view the Applicants have no right to refer the demand for the fairness of the dismissal of Palaza to the CCMA or to the Labour Court in terms of the Act. Palaza has a right to challenge his dismissal. His union has the right to do so too. Accordingly, in the court's view, the Applicants as individuals are not barred to participate in such a strike action in terms of section 65. However, the inquiry does not end there. Are the Applicants protected from dismissal? In a sense is the strike action that they participated in a protected one as it were?

[15] In terms of section 64, an employee has a right to strike if the issue in dispute has been referred to a council or to the commission and a certificate has been issued stating that the dispute remains unresolved or the 30 day period has expired. In addition, 48 hours notice of the proposed strike has been issued in writing. (section 64 (1) (a) and (b)). In this matter, no evidence was led to show that the issue in dispute had been referred to the CCMA and a certificate was issued or 30 day had expired. It ought to be remembered that the demand is not the unfair dismissal of Palaza, but a demand to have Palaza reinstated. There was some evidence that Palaza attempted to challenge the fairness of his dismissal, but that was

not the issue in dispute.

[16] No notice contemplated in section 64 (1) (b) was issued in this matter. The exceptions set out in section 64 (1) (b) (1) (ii) do not obtain. Section 67 (1) provides that a protected strike is one that complies with the provisions of the chapter. In terms of section 67 (4) an employer may not dismiss an employee who participated in a protected strike action. Accordingly, the strike action was not protected. In fact, Mr Qwesha conceded this point. Therefore the Applicants opened themselves to a possible dismissal by participating in such a strike action.

Did the Applicants participate in an unprotected strike action?

This much is common cause. The Applicants readily conceded that they participated in an industrial action on 19th of June 2006 and the court found that they did so even on 20th June 2006. The fact that the strike action was unprotected was well conceded by Mr Qwesha. Accordingly the question is answered in the affirmative.

Was the dismissal substantively fair?

In terms of section 188 (1) (a), dismissal is unfair if the employer fails to prove that the reason for dismissal is a fair reason related to the employee's conduct. In terms of section 188 (2) any person considering whether the dismissal is for a fair reason must take into account any relevant code of good practice.

[17] In terms of schedule 8 item 6, participation in a strike that does not comply with the provisions of chapter 5 is misconduct. A finding

has already been made that the strike did not comply. It is common cause that the Applicants participated on the 19th and the court found that they did on the 20th. It therefore follows that they committed a misconduct. Such is a fair reason to dismiss. Accordingly the dismissal is substantively fair. There was a serious contravention of the Act. No attempts were made to comply. The actions of employer to refuse to reinstate Palaza are justified.

Is the dismissal procedurally fair?

In terms of item 6 (2), prior to the dismissal the employer should at the earliest opportunity contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with an ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and to respond to it.

[18] The evidence before court points that at about 10H15 on 19th February 2006, many hours before dismissal a letter was sent to the union official requesting intervention. The management on various occasions discussed with the shopstewards what cause of action the Respondent intended to adopt. The Respondent issued five clear and unambiguous ultimatum and allowed the Applicants more than sufficient time to respond or reject. Page 6 is a clear indication of rejection of the ultimatum. The Respondent went to an extent of

initiating and inviting the individual Applicants to a hearing, which in the court's view was not necessary to do. The individual Applicants spurned this opportunity. Accordingly the Respondent adhered to the *audi alteram* rule. (see **Modise v Steve's Spar Blackheath (2000) 21 ILJ 519 (LAC), Karras t\a Floraline v SA Scooter** and **Transport Allied Workers union & Others (2000) 21 ILJ 2612 (LAC), Mzeku and Others v Volkswagen (2001) ILJ 1575 (LAC)** and **NUM & Others v Billard Contractors CC and Another (2006) 12 BLLR 1191 (LC)**. Having adhered to the *audi alteram* rule, the dismissal is bound to be procedurally fair.

Relief

[19] The dismissal of the 81 Applicants is both substantively and procedurally fair, therefore they are not entitled to any relief.

Costs

[20] Mr Qwesha argued that there should be no order as to costs. I do not see why costs should not follow results in this matter. The Applicants knew from the beginning that their strike was non-compliant. They knew that dismissal was inevitable due to that conduct. They, despite that knowledge dragged the Respondent to this court for a full three day trial.

Order

[21] In the result I make the following order:

1. The settlement agreement between the parties is hereby made an order of court.
2. The dismissal of the 81 Applicants is both substantively and procedurally fair.
3. The application is dismissed.
4. The 81 Applicants are jointly and severally ordered to pay the costs of the Respondent, the one paying absolving the others.

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G N MOSHOANA
Acting Judge of the Labour Court
Johannesburg

Appearances

For the Applicant	: Mr Qwesha
For the Respondent	: Adv Charoux
Instructed by	: Yusuf Nagoee Attorney
Date of hearing	: 28\05\2007
Date of Judgment	: 07\06\2007