IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG
REPORTABLE
Case Number: JS705/08
In the matter between:
SATAWU obo LANGA & 95 OTHERS Applicants
and
ZEBEDIELA BRICKS (PTY) LTD First Respondent
PROSPEC TRANSPORT 1037 (PTY) LTD Second Respondent
JUDGMENT
MOSHOANA AJ
INTRODUCTION
[1] This is a referral in terms of Section 191 of the LRA. The first respondent is a brick manufacturing company in Zebediela, Limpompo. The second respondent is a transport company, transporting bricks on behalf of the first respondent. For a 2

number of years, the second respondent performed transporting services for the first respondent. The two operated from the same premises. Around March 2006, talks to transfer the business of the second respondent to the first respondent commenced. Around the same time and in anticipation of the transfer, employees of the second respondent were advised that they will be transferred to the first respondent. In tandem, negotiations to have conditions of employment properly aligned were running. Whilst the negotiations were running, certain demands were made through the tribal office. These led to a work stoppage on 7 January 2008. A resolution was found on 8 January 2008, whereafter work resumed on 9 January 2008. The second respondent had some seven days within which to resolve the issues. On the seventh day, the issues were not resolved. This led to yet another work stoppage.
[2] This occurred on the 16th January 2008. Notices calling upon the employees to resume duties were issued and ignored. On 17 January 2008, the second respondent issued letters of dismissal to all striking employees. On 18 January 2008 an agreement was reached reinstating all the dismissed employees. The first group of employees were to report the night shift of the 18th January 2008. Other employees in Bushbuckridge were to report on Monday, 21 January 2008. The employees did not report the night shift neither did they report the other shifts. The employees continued to gather at the entrance of the premises of the respondents. In the course they intimidated other employees and customers. As a result, the first respondent obtained an interdict in the North Gauteng High Court. An interim interdict was issued on 8 February 2008. Despite all the above, employees continued not to report for duty, despite repeated pleas for them to 3

commence duties. On 1 February 2008, the applicant, SATAWU, referred a dispute of unfair dismissal to the CCMA. In terms of the referral documents, the dismissal occurred on 18 January 2008. On 23 June 2008 at a sitting at the CCMA, the respondents raised a point of jurisdiction. On 4 July 2008, a CCMA Commissioner, Francis Maake Kganyago issued a ruling to the effect that the CCMA did not have jurisdiction, since the employees were dismissed for participation in an unprotected strike action. Before the ruling was issued, the applicant contended that the employees were dismissed for refusing to sign new contracts. That contention related to an unsigned and undated notice. I shall revert to the notice later. Suffice to say that the notice advised that those who did not sign contracts are retrenched. In view of the ruling of lack of jurisdiction, the applicant referred the dispute to this court.

BACKGROUND FACTS AND EVIDENCE.

[3] At the commencement of trial, the respondents, then represented by Van Graan SC, who later withdrew, took an approach that, in an ambivalent way, suggested that this court lacked jurisdiction because the employees were reinstated therefore the dispute of alleged unfair dismissal did not exist. However the respondents led extensive evidence to justify the dismissal of the 17 January 2008. This of course made no sense in the light of the agreement of 18 January 2008. Nonetheless whilst the matter had adjourned for the continuation of hearing evidence, the respondents sought an amendment, which amendment sought to give the entire case a new twist in a sense. The applicants did not object to the amendment. As a result, the respondents filed an amended statement of case. 4

On 21 January 2010, when the matter was to resume, the court was advised of the amendment that took effect during the adjournment. It was at this time that the applicant's representative launched an objection. For reasons that will become apparent from the view I take at the end, I allowed the amendment. Nonetheless if the rules of the High Court were to be adopted, the amendment had taken effect anyway. Therefore for the purpose of this judgment, it will be a futile exercise to survey the evidence led in relation to the strike action. The critical evidence to be surveyed relates to the events after the 18th January 2008. I do so hereunder.
[4] On 18 January 2008, at or about 13h30, the second respondent and the applicant entered into an agreement. It is not necessary for the purposes of this judgment to quote the entire contents of the agreement. Of importance is that the agreement reinstated the employees who were dismissed for participation in an unprotected strike action. Parties agreed that duty will commence the night shift and employees at Bushbuckridge will commence on Monday 21 January 2010. In this regard the evidence of the respondent's witnesses was that on the night shift none of the applicant's members reported for duty. They were called on cell phones to no avail. Certain of the members, whose names were given out in court, intimidated other employees who wanted to report for duty. This state of affairs continued until the dispute was referred and also thereafter. One witness mentioned that the situation normalised around March/April 2008. A witness testified that employees were told to go back home as there was not much to do. This was allegedly told to him by one of the supervisors. The supervisor in question disputed that. In his evidence no one was turned away for reasons 5

alluded to by the other witness. Another witness testified about a document titled **“NOTICE”.** The evidence was that the notice was found at the entrance of the premises. Upon noticing it, he removed it. He noted that the said notice did not bear a company logo, was not signed and the language employed was not that of the management. Of course the suggestion being that some faceless person may have placed the notice at the security kiosk at the entrance. In cross-examination of the respondent’s witnesses, it was suggested that the employees wanted to report but could not because of the said notice. This was disputed on all the occasions. Versions were put as to what the employees would say obtained when they wanted to report. Such versions were disputed. Particularly that one of the supervisors told them that if they do not sign new contracts they are retrenched.

[5] To the Court’s utter amazement, those versions were not supported. No evidence was led by the applicants.

ISSUES REQUIRING DECISION BY THE COURT.

[6] In the pre-trial minutes, the parties raised a number of disputed facts. Given the view I take at the end and the effected amendment, some may not require an in-depth consideration. In the selfsame minute, the following required the court’s decision:

 Whether the dismissal of the individual applicants was substantively and procedurally fair and the relief to be awarded to the individual applicants if it decides that the dismissals were not substantively fair.

 Which of the respondents is the employer of the individual applicants?

[7] As pointed out earlier, the amendment brought a twist to this case. The respondents pleaded and actually argued that the agreement of 18 January 2008, extinguished all disputes arising out of the applicants' actions on 16 and 17 January 2008. That being the case, the issue whether the strike action dismissals were substantively and procedurally fair or not; does not obtain. I therefore would not decide the first issue as couched above. Decision on the second issue is of no moment given the view I take at the end. What then requires decision is whether the individual applicants ceased to work or to tender their services without valid justification?

ARGUMENT

[8] Both parties submitted written arguments. They are not worth repeating. In addition, parties made oral submissions. *Yeo* for the respondent argued that the court lacked jurisdiction in that the dispute was settled. Further he argued that since the individual applicants deserted, the dispute should have been referred to the CCMA for arbitration. With regard to the second point, he agreed with the court that it is appropriate to invoke the provisions of Section 158(2) (b). *Edmonds* for the applicants was not averse to the approach.

[9] *Yeo* argued that the referral should be dismissed with costs. He mainly alluded to uncontested evidence of intimidation. In relation to the **NOTICE**, he argued that 7

despite challenges on its veracity, no evidence was led to support the notice. He argued that the applicants had evidentiary burden, which they failed to discharge.
[10] *Edmonds* for the applicants argued that the applicant's version that they tendered services and were turned back is corroborated by one of the respondents' witnesses. She argued that the court must reject as false the evidence that seeks to contradict that. She argued that the applicants took a calculated risk not to testify as there was no need for them to do so. At the end she argued that the applicants' dismissal was automatically unfair within the contemplation of Section 187 (1) (g). She sought reinstatement and 24 Months compensation.

ANALYSIS OF EVIDENCE AND ARGUMENT.

[11] When it comes to evidence, the court is faced with only one version. That being the case it is hard for the court to then reject the evidence of the respondent's witnesses. There is no other comparable version. The applicants' noted with pride it seems, that they were taking a calculated risk. I doubt that it was a calculated risk. The applicants bore the evidentiary burden in respect of the versions they had put. It was clear I suppose to the applicants that the respondents are saying they deserted. With that clarity, it was incumbent on the applicants to rebut the evidence that they were called upon to return to work but they refused to do so.
[12] They raised as a defence the fact that the **NOTICE** actually prevented them. In other words they did not desert. This defence was in no uncertain terms rejected by the respondents' witnesses as being invalid. The argument that one of the 8

witnesses related what was told to him by the supervisor makes the version that they were turned back credible is without merit. In the first instance, even if the court were to accept that hearsay evidence, the reason for turning them back remains critical. According to that witness, the reason was lack of work. On the contrary, the reason advanced by the applicants is the **NOTICE**.

Were the applicants automatically unfairly dismissed?

[13] The applicants suggest that their dismissal is related to a transfer as contemplated in Section 197 of the Act. As a matter of uncontested fact, the respondents say the applicants deserted. Much as transfer within the contemplation of Section 197 was contemplated, factually, the transfer seems not to have taken place. Even if it did, according to the applicants, it took effect in 2006. The dismissal having allegedly taken place two years later simply suggest that the transfer is not even proximate to be the reason. The suspense conditioned sale was in October 2007. Still it makes no proximate cause. However the position on automatically unfair dismissal claims was crisply and accurately put by His Lordship Davis AJA in the matter of ***Kroukam v SA Airlink (2005) 14 LAC***. There the court said that an employee had to raise a credible possibility that an automatically unfair dismissal had taken place. Once he or she has done that then the employer must prove the contrary.

[14] In *casu,* the individual employees failed to testify. Therefore there is no credible possibility raised. On that score alone, I come to an irresistible conclusion that the dismissal was not automatically unfair. 9

Did the individual applicants desert?

[15] Although this part of the case was illuminated only when the amendment was sought, it is clear from the undisputed facts of this case that as at 18 January 2008, the dispute that led to the dismissal of 17 January 2008 was resolved. Therefore in the ordinary course, it was expected of the individual applicants to report for duty immediately thereafter in terms of the agreement. The fact that they did not is common cause in this matter. Therefore the question becomes, what does one call that non-reporting by the individual applicants?

[16] In Oxford Dictionary, desert means to leave somebody without help or support. It is synonymous to abandon. In ***SABC v CCMA and others [2002] 8 BLLR 693 (LAC),*** Mogoeng JA, held that desertion necessarily entails the employee's intention no longer to return to work. I fully agree. Unlike ordinary absenteeism, desertion requires an element of intention not to return to work. Where such an intention is not apparent, then there is no desertion but pure absence without permission. It seems to me that desertion in its truest sense automatically terminates a contract of employment. It cannot be seen as a form of misconduct. For instance a strike action may be seen as desertion. But what makes it not one is the intention to return once demands are met. This statement of course begs the question whether in a desertion situation should the *audi alteram* principle apply? I shall revert to this question later. The uncontested evidence in this 10

matter suggests a deliberate and unequivocal intention no longer to be bound by the contract of employment.
[17] Properly considered, the applicants' case on this score is that the **NOTICE** prevented them from reporting. Of course this case was never proven by the applicants. When compared with undisputed evidence of calling the individuals on the phone and verbally in some instance and insulting the witnesses who went to call them back, it is clear that this **NOTICE** story is a fabrication hence a dismal failure to prove it. The only logical conclusion to arrive at, on the strength of the uncontested evidence, is that the individual applicants deserted. There is no evidence upon which the court may ponder any glimpse of intention to return. Of course in the light of the evidence of one of the supervisors, the following individual applicants stated their intention to return but advised that they were intimidated. Those are:
- September Motapelo
- Daniel Madiba
- Sophonia Manabile
- Frans Kgomosotho
- Ernest Ramantjane
- Joel Seoko
- Dan Masola
- Richard Nkuna

- Joel Seakamela
- Alfred Kekana
- Piet Phalane
- Andries Seete
- James Masalesa
- Charles Makhafola
- Isaiah Malesa
- Jan Kekana

Therefore, it cannot be said, by the respondents' own admission that they deserted. They harboured the intention to return but were intimidated. Therefore they at best were absent without permission.

Were the applicants entitled to audi?

[18] It is trite law that the principle of *audi* finds application where adverse decision is taken. (See ***Modise and others v Steve's Spar Blackheath [2000] 5 BLLR 496 (LAC).*** It is common cause in this matter that the respondents did not take a decision to dismiss the individual applicants. In the public service, desertion is regulated by statute. The courts have repeatedly refused to consider such as a dismissal. The other simple reason, in my view, being that no decision is taken by the employer to dismiss. Courts also refused to review under PAJA. However the point in this matter is that the individual applicants did not even return to the respondents to tender their services. All they did was to refer a dispute of a 12

dismissal which they knew at the time did not exist by virtue of the agreement of the 18th January 2008. By refusing to heed the call to return and actually insulting their supervisor, the individual applicants threw down the gauntlet as it were. However same cannot be said in respect of the individuals mentioned earlier. Although the court heard no evidence from them, the respondent's witness advanced their case as it were. Therefore the second respondent was obliged to hold a disciplinary hearing in respect of those, in order to test the allegation of being intimidated. The respondent knew where they were and could have simply served them with charges for being absent without permission. However, it is clear in this matter that the respondents painted everybody with the same brush-they all deserted, it follows that no decision to dismiss those individual was taken. The witness did not testify that after hearing that they were intimidated; the employer then rejected this and dismissed them. At best he said they were then dismissed on 17 January 2008 for strike action. This does not help because it is common cause that the actions were extinguished by the agreement of the 18th January 2008.

[19] In the *SABC* matter *supra*, the LAC found that the conduct amounted to absent from work which was misconduct. In that regard, it was incumbent on the employer to afford the employee there an *audi.* In the matter before me the facts point to a desertion as opposed to absence without permission. In my view the other individual employees were not entitled to *audi.* Even if I am wrong, the evidence points to the effect that the individual applicants were afforded *audi*. They were called on the phone to hear why they are not reporting. Others, which I had mentioned above, gave reasons why they did not report for duty-they were 13

intimidated. In respect of those, *audi* should have extended to a holding of a disciplinary hearing. By necessary implication, the respondent rejected their reason without hearing them further.

Is the dismissal of those who did not desert substantively fair?

[20] As pointed out earlier, the respondents painted everyone with the same brush. However, their own evidence suggests that others did not desert. Given the approach of same brush, it follows that the termination of those individuals is not as a result of desertion. It therefore can only follow that their dismissal, although not directly effected by the respondents, by taking a decision, is as a result of being absent without permission. Such is a misconduct, which entitles an employer to terminate employment. *Prima facie*, there is a fair reason to terminate. Such is related to conduct. The question also to be determined is whether dismissal was an appropriate sanction for such misconduct? Generally, it is appropriate to dismiss for being absent without permission. However in this matter, the individuals in question were not dismissed for being absent from work, but they were deemed to have deserted. Question is should an employer dismiss even where there is a justifiable excuse? *Prima facie*, being intimidated is an excuse. Whether it is a justifiable excuse depend on the extent and the nature of the intimidation. In *casu,* the respondents' witness relied on the *ipse dixit* of those individuals. No further details were given. It is therefore difficult for the court to say that there was a justifiable excuse. It would have assisted the court a great deal if those individuals came forth to strengthen the *ipse dixit*. The fact that they 14

never returned after supposedly the quelling down of the intimidation is of serious concern. Much as the court technically gave them the benefit of doubt that their not returning was not intentional to amount to desertion, the fact that they did not return at any stage makes their absence from duty serious to warrant a dismissal. Again I cannot help it but to lament that the court waited with bated breath for their evidence. The fact that they are given a technical benefit of doubt is supported by the fact that not once was it put to any of the respondent's witnesses that they were intimidated and how. It was only in argument that *Edmonds*, opportunistically in my view, argued that if they were intimidated then they had a justifiable reason. This retort does not advance the applicants' case. The individual applicants bore the evidentiary burden to show the justification. There is of course a thin and technical divide between being absent without permission and desertion. The fact that the respondents painted everybody with the same brush attests to the thin and technical divide.

[21] Much as I am aware of authorities that held that in justifying a dismissal, an employer is somewhat confined to the reason that led to the decision to dismiss, I take a different approach in respect of desertion and absence from work. In both there is an element of not tendering services. The facts of this case points to not tendering services. The state of mind is another aspect, which if not overtly brought to light cannot be easily inferred. This court therefore would accept as justification, absence from work in order to determine the substantive fairness of the dismissal of the above mentioned individuals. I therefore conclude that their dismissal is substantively fair nonetheless. 15

Is the dismissal of those who did not desert procedurally fair?

[22] The evidence of the employer suggests that upon being advised of the intimidation, it continued to hold a view of desertion thereby dismissing for absence without permission. In argument, *Yeo* submitted that the applicants did not present themselves for them to be heard. In the *SABC* matter, the LAC had the following to say:

"The third respondent was traceable for the purpose of a disciplinary hearing, had the appellant decided to hold one... The appellant knew where to find him... The third respondent's failure to heed the appellant's written warning to report for work on specified dates or else run the risk of being deemed to have deserted his post, did not excuse the appellant from holding a disciplinary hearing prior to the third respondent's dismissal. Accordingly, the commissioner was correct in concluding that the dismissal was procedurally unfair..."

It therefore follows that the respondents should have held a hearing although not formal to give the said individuals an opportunity to elucidate on the intimidation that caused them not to report. The question whether they would have been able to do so convincingly dose not obtain at this stage of the inquiry. The no difference approach had been rejected a long time ago. The respondents knew where to find them for the purpose of that hearing. Therefore the dismissal of those employees was procedurally unfair. 16

The issue of who the employer is.

[23] As I had pointed out earlier, given the approach I take at the end, the issue is academic. However for completeness sake, I conclude that a transfer had not taken place, therefore the provisions of Section 197 had not taken effect. Besides, the applicants bore the onus to prove the transfer. They failed to do so. They led no evidence to support the allegation that they were transferred to the first respondent at any effective date. The agreement to reinstate was entered into with the second respondent. Therefore the second respondent is the employer.

The issue of the relief.

[24] Since the court has found that the dismissal of those listed employees is procedurally unfair then follows the issue of remedy. In dealing with that issue, I must first consider whether I should order the second respondent to pay compensation to the employees. In exercising that discretionary power, I take into consideration that the respondents themselves illuminated the evidence that the absence was caused by the intimidation. Having done so furnished no justifiable reason why the applicants could not be heard before painting them with the same brush as others. As pointed out earlier, the respondents did not overtly state that they do not accept the justification of absence and therefore dismiss. However their conduct is consistent with the fact that the justification was rejected without affording those employees an opportunity to elucidate on the justification. I also take into account the fact that when it was opportune, the said applicants, chose 17

not to take the court into their confidence by giving evidence on the nature and extent of the intimidation. This would have given the court a sense of the importance of being heard. In the light of the above, I exercised my discretion in favour of awarding compensation as opposed to denying it.

[25] The second issue to consider is what would be a just and equitable compensation within the contemplation of Section 194 (1) of the LRA. In coming to the amount awarded, I take into consideration that to a limited extend though, the applicants were heard. The respondents took the trouble to establish the reasons of absence. Although in my view they should have done more, that counts for something and ought not to be ignored. I again took into account that the court heard no evidence from those individuals in order to weigh the importance of the right lost. In view of the above, compensation, which takes a form of *solatium,* ought to be minimal. It is just and equitable to order minimal compensation for those employees.

Conlusion

[26] In summary, the respondents succeeded in showing on the balance of probabilities that the other individual applicants demonstrated an intention not to return to work and therefore had deserted. However in their own evidence, the other listed employees expressed their intention to report had they not been intimidated. Therefore they did not desert, but were absent without permission, an act of misconduct. There was no obligation to afford an *audi* to the deserters but 18

there was for the non deserters. Even if there was an obligation for the deserters, such was discharged by calling and seeking to be given a reason why they are not reporting. However, in respect of non deserters, more needed to be done. Accordingly, the other individual applicants had deserted and unilaterally terminated their employment. In respect of the remainder as listed, their dismissal is substantively fair but procedurally unfair. There is no basis to find any automatically unfair dismissal. For the procedural unfairness, the individual applicants are entitled to minimal compensation. The first respondent remains the employer of the applicants.

Costs

[27] In considering this issue I am guided by Section 162. This is a matter where both parties were successful. This is an appropriate case where costs should follow the results. However, it seems fair that the applicants be awarded costs up to the amendment. In my view, the respondents had wasted time in tendering evidence to justify a dismissal, which they later acknowledged was extinguished by the agreement of 18 January 2008. It also seems fair for the respondents to be awarded costs from 21 June 2010 to 25 June 2010. The applicants knew after the amendment that the case of the respondents is one of desertion, yet they persisted to put versions and failed to prove them.

Order

[28] In the result I issue the following order. 19

28.1 The second respondent is the employer of the individual applicants.
28.2 The Individual applicants not listed in the judgment have deserted.
28.3 The listed Individual applicants were dismissed for being absent from work without permission. Their dismissal is substantively fair but procedurally unfair.
28.4 The second respondent is ordered two pay to each of them as compensation two weeks salary calculated at their rates of remuneration on 18 January 2008.
28.5 The second respondent to pay the costs of the applicants from the inception of the referral up to and including the date of the amendment. The applicant, SATAWU, is to pay the costs of the respondents from 21 June 2010 to 25 June 2010.

_____

G.N MOSHOANA

Acting Judge of the Labour Court

Date of Hearing: 01 March to 03 March 2010, 6, 7, 8, 9, April 2010 and 21, 22,23,24,25 June 2010.

Date of Judgement: July 2010

APPEARENCES

For the Applicant: Ruth Edmonds of Ruth Edmonds Attorneys, Johannesburg.

For the Respondents: Adv C B Yeo instructed by Fairbridges attorneys, Illovo.