REPUBLIC OF SOUTH AFRICA

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# THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

## JUDGMENT

Case no: C 527/06

In the matter between:

**SATAWU obo Rune and others** **Applicants**

and

**BOSASA SECURITY (PTY) LTD** **Respondent**

**Heard**: **6-7 May 2013**

**Delivered**: **13 May 2013**

**Summary:** Dismissal during protected strike for being absent without permission – true reason for absence and dismissal being participation in protected strike – automatically unfair – compensation of 15 months' remuneration awarded.

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**JUDGMENT**

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STEENKAMP J

Introduction

[1] The individual applicants were dismissed for being "absent without permission for three consecutive shifts". It is common cause that they were participating in a protected strike. Was the dismissal automatically unfair?

Background facts

[2] The applicant trade union, SATAWU (the South African Transport and Allied Workers' Union) is one of a number of trade unions that took part in a nationwide protected strike in the security industry in May 2006.[1] The respondent, Bosasa Security (Pty) Ltd, is an employer in that industry.

[3] SATAWU represents 25 individual applicants in this matter.[2] They were employed by Bosasa. Most of them joined SATAWU around 21 March 2006. Shortly thereafter[3] the union's regional organiser, Mr J Sifuba, wrote to Bosasa claiming organisational rights in terms of section 21 of the Labour Relations Act.[4] He attached the signed stop order subscription forms of the newly signed up members and asked for a meeting. It was met by a curt response from Bosasa's group industrial relations co-ordinator, Mr Vivi Masina. In a letter dated 6 April 2006[5] to Mr Sifuba he stated:

> "1. The company denies that your union is representative of our employees. Our records show the contrary to your claim.
>
> 2. Any membership forms you may have are no justification for a meeting for us to see the forms. We can see the forms without you present.
>
> 3. We are able to compare your membership with our total compliment [*sic*] and calculate your representivity in our organisation. In our view this does not warrant a meeting.
>
> 4. The foregoing is standard practice in terms of our threshold policy and has been applied throughout all eight unions within our group."

[1] This trail was heard seven years later, in May 2013. The reason appears to be that a default judgment was handed down in the applicants' favour by the late Nel AJ in March 2007; the respondent applied for rescission; that application was only granted in October 2012 after lengthy settlement negotiations failed; the respondent then delivered a statement of response; the parties delivered a pre-trial minute on 24 January 2013; and the trial commenced on 6 May 2013.

[2] The exact remaining number of applicants will be discussed later.

[3] The date is unsure because the original letter cannot be found; it is common cause that it was between 21 March and 6 April 2006.

[4] Act 66 of 1995 (the LRA).

[5] The letter was copied to Mr Danie Roodt, a Bosasa employee who chaired the later disciplinary hearings and testified in these proceedings.

[4] In the meantime, on 15 March 2006, SATAWU had sent a notice to all the employers' organisations in the security industry in terms of section 64(1)(b) of the LRA notifying them that the union would embark on a protected strike on 23 March 2006. The strike was due to take place for an initial two days on 23 and 24 March 2006; and if no agreement could be reached, it would continue on 3 April 2006.

[5] On 20 March 2006, another trade union, the South African Private Security Workers Union, wrote to Bosasa separately notifying it of the national protected strike "where all the trade unions that organise in the private security sector will be participating fully".

[6] The strike did proceed on 23 and 24 March 2006, and then again from 13 April 2006 until a settlement was reached on 23 June 2006.

[7] On various dates in April 2006, Bosasa sent out sms[6] messages to its employees who had been absent from work for three consecutive shifts. It could only make one of these messages available in these proceedings. It reads as follows:

> "Bosasa Security: You have been absent from work from 12/04/06 to date. Report to regional office on 24/04/06 at 10h00 for disciplinary hearing."

[8] The individual applicants – who were participating in the protected national strike at the time – did not report for such hearings. Mr Danie Roodt, who testified in these proceedings, proceeded with disciplinary hearings *in absentia*. He testified that he did so in terms of the respondent's disciplinary code that provides for a disciplinary hearing in cases where an employee has been absent without permission for three consecutive shifts; and that the code recommends dismissal for such absence. He dismissed all of the applicants *in absentia*.

[9] On 23 June 2006, after the strike had been resolved, the individual applicants reported for duty. They were told that they had been dismissed, but they could appeal against those dismissals. They refused. Mr Sifuba testified that the union advised them that an appeal was unnecessary, as their dismissal was unfair in the first place. The union and its members

[6] Short message service texts.

were of the view that they were not absent without permission. The reason for their absence was that they were participating in a protected strike.

[10] After a telephonic discussion between Messrs Sifuba and Roodt, the trade union reiterated its view in a letter to Roodt – copied to Masina – on 23 June 2006. It reads:

> "Re: dismissal of workers for partaking in an industrial action
>
> In reference to our tele-conversation this morning, you have confirmed that you have dismissed all your workers that have legally participated in an industrial strike action.
>
> We are, therefore, informing you that your employees have joined SATAWU, they are now belonging to SATAWU and not Nehawu. We have faxed you the application forms and we can prove that to you.
>
> I do not think that your employees needed your permission to join a union of their choice and it was not the duty to inform you but our office in which we did [*sic*].
>
> We are, therefore, informing you that you give us no alternative but to refer the case at CCMA for mediation."

[11] Once again, this was met with a curt response from Masina. In a letter dated the same day – and copied to Messrs Roodt and McNamara, who testified in this trial – he simply said:

> "The company denies your allegations and does not intend to respond to your correspondence in detail and reserves all its rights to do so at the appropriate time and forum."

[12] The union then referred an unfair dismissal dispute to the CCMA. It remained unresolved and the union referred it to this court.



Evaluation / Analysis

[13] The applicants claim that their dismissal was automatically unfair in terms of section 187(1)(a) of the LRA. That section reads:

> "(1) A dismissal is automatically unfair ... if the reason for the dismissal is –
>
> (a) that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of chapter IV".

[14] It is common cause that the applicants participated in a strike that complied with the provisions of Chapter IV of the LRA. But the respondent contends that that was not the reason for the dismissal. Mr *Campanella* argued that the reason for the dismissal was that the employees were absent from duty without permission; and that, if the employees had exercised their right to appeal and explained that they were participating in a protected strike, they would have been reinstated.

[15] Mr Roodt, who chaired the disciplinary hearings, was adamant that he had to apply the company's disciplinary code consistently. If an employee was absent without permission for three consecutive shifts, he had to be disciplined. It was up to the individual applicants to come and explain why they were absent.

[16] This strikes me as a cynical approach. The applicants were called to a disciplinary hearing while the strike was ongoing. It is common cause that it was a national protected strike. Mr Roodt claimed that he did not know whether the applicants were SATAWU members and whether they were participating in the strike. If that is so, he only had himself to blame. The union pertinently brought it to his attention that the applicants had joined SATAWU. Mr Sifuba even sent copies of the applicants' stop order subscription forms to the respondent. The response – on which Mr Roodt was copied – was to say that the company could look at the forms without the union present and that no meeting was necessary. And in any event, it matters not whether the applicants were members of SATAWU at the time of the strike – what matters is that they participated in the strike and that it was protected.[7] Roodt was well aware of the national strike and the fact that SATAWU and its members were participating in it. It was obvious that this was the reason for the applicants' absence from work.

[17] The evidence of Mr McNamara, who chaired the appeal hearings – such as they were – is equally implausible. Hypothetically, he says that he would have reinstated any employees who exercised their right to appeal and explained that they were participating in a protected strike. There is no evidence that there were any appeals that were dealt with in this manner.

[7] *SATAWU & others v Moloto NO & ano* (2012) 33 *ILJ* 2549 (CC).

But the most telling lack of evidence is the complete absence of any contemporaneous correspondence that bears out this hypothetical version. When Mr Sifuba pertinently and in writing made the allegation that the workers had been dismissed for participating in protected strike action, the company simply denied it. Neither Mr Masina, nor Roodt or McNamara - both of whom were part of the exchange of correspondence – wrote to the trade union to invite it and its members to lodge appeals; or to explain that, should the workers merely state on appeal that the reason for their absence was their participation in the protected strike, they would be reinstated. Yet that is the version that Mr McNamara now relies upon.

[18] It is so that the formal reason for dismissal was "absence without permission for three consecutive shifts". But the reason for that absence was the applicants' participation in a protected strike. The respondent knew full well that there was a national protected strike. It also knew that SATAWU was one of the prominent trade unions participating in the strike; and SATAWU pertinently brought it to the company's attention that the applicants had joined the union. The real or underlying reason for the dismissal was undoubtedly their participation in the protected strike.

[19] In *Mouton v Boy Burger (Edms) Bpk*[8] this court considered the true reason for dismissal in a claim for automatically unfair dismissal. The court cited with approval the following *dictum* of Froneman DJP in *SA Chemical Workers Union v Afrox Ltd:*[9]

> "The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation and I can see no reason why the usual twofold approach to causation, applied in other fields of law, should not also be utilized here (compare *S v Mokgethi & others* 1990 (1) SA 32 (A) at 39-41A; *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34). The first step is to determine factual causation: was participation or support, or intended participation or support, of the protected strike a *sine qua non* (or prerequisite) for the dismissal? Put another way, would the dismissal have

[8] (2012) 33 *ILJ* 249 (LC).

[9] (1999) 20 *ILJ* 1718 (LAC) para [32].

> occurred if there was no participation or support of the strike? If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, that does not immediately render the dismissal automatically unfair; the next issue is one if legal causation, namely whether such participation or conduct was the "main" or "dominant", or "proximate", or "most likely" cause of the dismissal. There are no hard and fast rules to determine the question of legal causation (compare *S v Mokgethi* at 40). I would respectfully venture to suggest that the most practical way of approaching the issue would be to determine what the most probable inference is that may be drawn from the established facts as a cause of the dismissal, in much the same way as the most probable or plausible inference is drawn from circumstantial evidence in civil cases. It is important to remember that at this stage the fairness of the dismissal is not yet an issue (see para [33] below). Only if this test of legal causation also shows that the most probable cause for the dismissal was only participation or support of the protected strike, can it be said that the dismissal was automatically unfair in terms of s 187(1)(a).If that probable inference cannot be drawn at this stage, the enquiry proceeds a step further."

[20] Mr *Campanella* argued strongly that the company did not have a malicious motive in dismissing the applicants. But, as Froneman DJP made clear in the passage cited above, that is not the end of the enquiry. The most probable inference is that the applicants were dismissed because they were participating in the strike. The dismissal would not have occurred if they had not participated in the strike. But for the strike, they would have had no reason to stay away from work. And once it has been established that their participation in the strike was the "main" or "dominant", or "proximate", or "most likely" cause of the dismissal, there can be no doubt that the dismissal was automatically unfair, as it falls foul of s 187(1)(a).

[21] Mr Sifuba was correct when he said in cross-examination that it was unnecessary to appeal. If both parties had been more co-operative, it may well be that this court would not have had to deal with this dispute seven years after the fact. The fact remains, though, that the dismissals were unfair *ab initio*; the onus was not on the trade union or its members to appeal against those dismissals. The scenario is remarkably similar to that

involving the same trade union in *SATAWU v Platinum Mile Investments (Pty) Ltd v Transiton Transport,*[10] where the court held:

> "Because the industrial strike action was lawful the respondent was wrong in demanding that the striking employees had to resume work, in resorting to the industrial lock-out action, in accusing them, in finding them guilty and in dismissing them in their absence. Since the employees did not participate in an unlawful strike, they did not commit any misconduct which warranted the taking of any disciplinary actions against them. The verdict was premised on an assumed state of affairs, which did not really exist. There was no fair reason for the dismissals. They were automatically unfair."

[22] In the case before me, it is clear that the real or proximate cause for the applicants' absence from work, and thus for their dismissal, was their participation in the national protected strike. Once that has been established, their dismissals were automatically unfair. They did not commit misconduct by staying away from work whilst participating in a protected strike.

[23] Having decided that the dismissals were automatically unfair, I have to decide on the appropriate compensation. None of the applicants desires reinstatement. But before I can do that, I need to consider who the remaining applicants are.

The applicants before court

[24] The trade union initially acted on behalf of 25 of its members (the individual applicants). By the time the matter came to trial seven years later, the union could no longer obtain instructions from some of them. Mr *Field*, for the applicants, was commendably frank with the court. He stated that, in respect of eight of the applicants, the union no longer had any instructions. in respect of a ninth one, Mr Bonginkosi Thwani, he handed up a death certificate. Mr Thwani passed away in December 2012. Mr Field had no instructions from the executor of his estate, if any. I agree with Mr *Campanella* that the court is not in a position to order any relief in favour of those six employees who are no longer before court.

[10] (2008) 29 *ILJ* 1742 (LC) para [76].

Compensation

[25] With regard to the remaining applicants, Mr *Field* urged me to order the maximum compensation envisaged by s 194(3) of the LRA, i.e. 24 months' remuneration.

[26] In *CEPPWAWU v Glass & Aluminium 2000 cc*[11] the Labour Appeal Court considered the factors to be taken into account when awarding compensation in cases of automatically unfair dismissal. Nicholson JA commented:

> "[49] In considering whether or not to award compensation in such a case, the court must consider that not to award any compensation at all where reinstatement is also not awarded may give rise to the perception that dismissal for such a reason is being condoned. This may encourage other employers to do the same. It must also take into account the fact that such a dismissal is viewed as the most egregious under the Act. Accordingly there must be a punitive element in the consideration of compensation.
>
> [50] Once the court has decided to exercise its discretion in favour of awarding compensation and it seeks to determine the amount of compensation, it must bear in mind that:
>
> *(a)* it may not award compensation exceeding the equivalent of 24 months' remuneration;
>
> *(b)* the amount of compensation it awards is required to be 'just and equitable in all the circumstances';
>
> *(c)* the amount of compensation that is awarded to an employee whose dismissal is unfair because there is no fair reason to dismiss cannot be less, but can be higher, than the amount that would be awarded to the same employee if he was in precisely the same circumstances but his dismissal was only unfair because the employer has not followed a fair procedure;
>
> *(d)* the highest amount of compensation that can be awarded to an employee under s 194 is provided for a dismissal that has been found to be automatically unfair (ie subsection (3));

[11] (2002) 23 *ILJ* 695 (LAC) paras 49-50.

> *(e)* an amount of compensation purporting to be awarded under subsection (3) to an employee whose dismissal has been found to be automatically unfair would not meet the requirement of subsection (3) of being 'just and equitable in all the circumstances' if it is lower than the amount that would be awarded to the same employee if his dismissal was not automatically unfair but was unfair either, because the employer did not follow a fair procedure, or, because the employer failed to prove the existence of a fair reason to dismiss;
>
> *(f)* ordinarily the amount of compensation that an employee whose dismissal has been found to be automatically unfair would be awarded would be higher than the amount that would be awarded to an employee whose dismissal is only unfair because the employer did not follow a fair procedure or than the amount that would be awarded to an employee whose dismissal is unfair because the employer has failed to prove the existence of a fair reason to dismiss;
>
> *(g)* the amount of compensation that is awarded to an employee whose dismissal has been found to be automatically unfair must reflect an appreciation of the fact that, save in exceptional circumstances, such employee would be the most deserving of an order of reinstatement with full retrospective effect to the date of dismissal so as to place the employee in the same position he would have been in had he not been dismissed, but also to penalize the employer for dismissing the employee for a prohibited reason."

[27] In that case, the dismissed employee had been out of work for more than 24 months. In the case before me, all of the applicants found new jobs at better compensation – albeit due, in some cases, to the successful strike for higher wages – within six months. But an award of compensation in cases of automatically unfair dismissal is not akin to damages or mere pecuniary loss. It goes further – it contains an element of a *solatium*, and it is also designed, as the Labour Appeal Court said in *CEPPWAWU v Glass & Aluminium,*[12] "to send a clear message to all employers, who may be tempted to dismiss employees for any of the prohibited reasons, that such conduct is totally unacceptable and would be met with severe disapproval by this court."

[12] At 710I para 52.

[28] Taking these factors into account, I consider the award of 15 months' compensation initially awarded by the late Nel AJ on a default basis to be just and equitable.

Costs

[29] Both parties submitted that costs should follow the result. I see no reason in law or fairness to disagree.

Order

[30] I therefore make the following order:

30.1 The dismissal of the individual applicants by the respondent is declared to be automatically unfair.

30.2 The respondent is ordered to pay each of the applicants in schedule 'C' (submitted at trial), except for applicants number 1, 10, 12, 16, 19, 20, 21, 24 and 25, compensation in the amount of R22 500, being the equivalent of 15 months' wages at the time of their dismissal.

30.3 The respondent is ordered to pay the applicants' costs.



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Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

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| APPLICANTS: | Wayne Field of Bernadt Vukic Potash & Getz, Cape Town. |
| RESPONDENT: | Joe Campanella<br>Instructed by Jon Greg Wilson Attorneys, Cape Town. |