REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 592/13

In the matter between:

DANIEL SAMBO	**FIRST APPLICANT**
JACQUES JAFTHA	**SECOND APPLICANT**
ANDRIES AMBROSE	**THIRD APPLICANT**
DAWID JOOSTE	**FOURTH APPLICANT**
SALMON SWARTS	**FIFTH APPLICANT**
DANIEL JONAS	**SIXTH APPLICANT**
LINDA AFRIKA	**SEVENTH APPLICANT**
ADEAN BRUINTJIES	**EIGHTH APPLICANT**
ESMERALDA GROOTBOOM	**NINTH APPLICANT**
DONOVAN GROOTBOOM	**TENTH APPLICANT**
CHRISTIAN PAULSEN	**ELEVENTH APPLICANT**
CSAAWU	**TWELFTH APPLICANT**

AND

STEYTLER BOERDERY	**RESPONDENT**

Heard: **2 June 2014**

Delivered: **3 June 2014**

Summary: Strike dismissal – dispute arising from dismissal on 21 Jan 2013 – that dispute not referred to conciliation – case dismissed for lack of jurisdiction.

JUDGMENT

STEENKAMP J

Introduction

[1] This dispute arises from the protracted farmworkers' strike in the Western Cape during December 2012 and January 2013. It is common cause that the strike was unprotected. The 11 individual applicants are former employees of the respondent, Steytler Boerdery. They are represented by their trade union[1], the Commercial, Stevedoring, Agriculture and Allied Workers' Union (CSAAWU). The union played an active role in the strike. The employees were dismissed on 21 January 2013. They argue that their dismissal was automatically unfair in terms of s 187(1) of the LRA[2]; alternatively, that it was substantively and procedurally unfair.

[2] At the commencement on the trial yesterday, 2 June 2014, Mr *Crowe SC* for the respondent raised a jurisdictional point *in limine.* He argued that the dispute was not properly before this Court. In their referral to the CCMA, the applicants alleged that they were dismissed on 8 January 2014. That is the dispute that was unsuccessfully conciliated and that was referred to this Court. But in fact, they were only dismissed on 21 January 2013 after a disciplinary hearing.

Common cause facts

[3] No evidence has yet been led. Yet there are a number of facts that are common cause.

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[1] Cited as the twelfth respondent.

[2] Labour Relations Act 66 of 1995.

[4] The workers participated in an unprotected strike. They were represented by CSAAWU. On 8 January 2013 at 07h00 they were addressed by the farmer, Dawid Steytler. A transcript of the address served before the Court. It is not disputed. It reads as follows:[3]

"**Steytler:** OK, ek het gisteraand om kwart oor sewe 'n oproep van Jacques [Jaftha – the second applicant] gekry waarin julle my in kennis stel dat julle môre vir 'n onbeperkte tyd gaan staak. Is dit nog julle amptelike posisie? Ja of nee? Jacques, jy't my mos gebel – is dit nog julle amptelike posisie?

Jaftha: Ja.

Steytler: OK. Ek het gisteraand aan julle verteenwoordigers dit duidelik gemaak weer eens, Jacques en Elroy [[Paulsen – the eleventh applicant] was by my in die kantoor. Ek het dit weer eens aan julle verteenwoordigers duidelik gemaak dat julle optrede strydig is met die wet, die Wet op Arbeidsverhoudinge, Wet Nr 66 van 1995 soos gewysig. Daar word dit baie duidelik gemaak wat die prosedure is wat julle moet volg indien julle aan 'n staking wil deelneem. Ek het dit ook aan julle verteenwoordigers duidelik gemaak dat julle nou reeds by sewe, sewe geleenthede gewaarsku is oor jul onwettige optrede. Hierdie onregmatige oprede kom op hierdie stadium neer op niks anders as ekonomiese sabotasie nie en ek kan dit nie verder duld nie. Dus laat julle aan my geen ander keuse as om julle uit te sluit nie. Weens julle onregmatige optrede word julle met onmiddellike ingang uitgesluit. Julle sal derhalwe nie verder werk nie en die beginsel van geen werk, geen betaling sal geld. ... Hierdie uitsluiting sal geld totdat ek 'n skriftelike onderneming van julle verteenwoordigers ontvang het waarin julle julle verbind daartoe dat julle sal ophou met julle onregmatige, onwettige en ondermynende optrede. Alvorens ek so 'n onderneming ontvang het kan ek ongelukkig niemand toelaat om te werk nie. Of die uitsluiting dus vir een dag, een week, een maand of een jaar geld – up to you. En dis al wat ek vir julle wil sê."

[5] On the same day at 11h47, CSAAWU wrote to Steytler. It said[4]:

"**RE: Termination of contracts of all employees**

Could please inform for the reason of termination of employees contracts without following due processes as per the Act prescribe. We appeal to you to reinstate these contracts today before close of business."

[6] Steytler responded an hour later, at 12h51. He said:

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[3] My underlining.

[4] Spelling and grammar as in the original.

"Graag wens [ek] u in te lig dat werkers se kontrakte nie beëindig is soos u in die faks beweer nie. Daarom sou dit uit die aard van die saak nie nodig wees om hul kontrakte weer in te stel nie."

[7] Despite that, CSAAWU referred an unfair dismissal dispute to the CCMA on the same day on behalf of the workers. In the referral form[5] it alleged under the heading, "Summarise the facts of the dispute you are referring":

"On the 8/01/2013 the employer terminated employees [*sic*] contracts with the farm without reason or informing the union."

[8] The union alleged that the dispute arose on 8 January 2013; and in Part B ("additional form for dismissal disputes only") it alleged that the workers were dismissed on 8 January 2013.

[9] Later the same day, at about 18h07, the employer sent a bulk sms to all the workers in these terms:[6]

"Dinsdag 8 Januarie om 18h07

U word almal daaraan herinner dat u enige tyd die uitsluiting kan ophef deur by bestuur vir werk aan te meld en 'n onderneming te onderteken dat u u in die toekoms sal weerhou van enige verdere onregmatige of onwettige arbeidsoptrede."

[10] The next day, 9 January, Steytler sent a letter to CSAAWU in the following terms:

"Graag bring ek die volgende onder u aandag en vra u ingryping:

Die werkers van River House is tans op 'n onbeskermde staking. Hierdie is reeds die sesde keer in die laaste twee maande dat hulle op 'n onbeskermde staking is en hulle is reeds agt keer gewaarsku om nie met hulle onwettige optrede voort te gaan nie. Indien hulle sou voortgaan met hulle onwettige en ondermynende optrede sal dit aan my geen ander keuse laat as om dissiplinêr teen hulle op te tree nie.

Die 'shop steward' het my eergister ingelig dat hulle bes moontlik reeds gister (8 Januarie) met hul staking wou begin. Hulle het egter geweier om my in te lig presies wanneer hulle sou begin staak. Weens hierdie optrede en soortgelyke optredes die afgelope twee maande het ek geen ander keuse gehad om hulle uit te sluit nie. Ek het dit egter aan hulle baie duidelik gemaak dat hulle uitsluiting enige tyd weer opgehef sal

[5] LRA form 7.11.

[6] My underlining.

word indien hulle vir werk sal aanmeld en ‘n onderneming gee dat hulle hulle van verdere onwettige optredes sal weerhou.

Ek vra derhalwe dat u dit onder u lede se aandag sal bring dat hulle optrede in stryd is met die wet en dat u hulle sal aanraai om op te hou met hulle onregmatige optredes en op die laatste môre (10 Januarie 2013) sal aanmeld vir werk. Die onderneming strewe ten alle tye daarna om goeie verhoudings te bevorder, maar die werkers se vreemde optrede is besig om verhoudinge ernstig te benadeel. Hul optrede kom op niks anders as ekonomiese sabotasie neer nie.”

[11] On the same day at 17h44 Steytler sent another bulk sms to the workers:

“U word hiermee herinner dat u welkom is om môre vir werk aan te meld mits u bereid is om te onderneem om u van verdere onwettige optrede te weerhou.”

[12] The workers did not accept this invitation. But in any event, on 10 January – two days after having imposed the lockout -- the employer lifted the lockout. It issued and read the following notice to the workers:

“**Kennisgewing van beëindiging van uitsluiting**

Na aanleiding van die onregmatige kollektiewe optrede (onbeskermde staking) deur julle het die bestuur besluit om julle uit te sluit totdat ‘n oplossing vir die dispuut gevind kan word. Tot op hede is geen griewe of dispuut verklaar nie. Bestuur gee hiermee kennis aan u dat die uitsluiting beëindig word en dat alle werknemers teen môre, 11 Januarie 2013, weer moet aanmeld vir werk op die normale invaltyd. Die bestuur beskou enige onregmatige kollektiewe optrede in ‘n ernstige lig en enige verdere kollektiewe aksie (onbeskermde staking) kan lei tot dissiplinêre optrede.”

[13] The workers did not return to work as instructed. At 09h04 on 11 January the employer issued an ultimatum in the following terms:

“**BAIE BELANGRIK**

ULTIMATUM OM TERUG TE KEER WERK TOE

Hiermee word u in kennis gestel dat u vandag (11 Januarie 2013) om 13h30 (halftwee) moet terugkeer werk toe.

Indien u sou weier om aan die ultimatum gehoor te gee sal daar dissiplinêr teen u opgetree word.”

[14] The workers ignored the ultimatum. At 18h30 on the same day the employer issued a final ultimatum:

"**UITERS BELANGRIK!!**

FINALE ULTIMATUM OM TERUG TE KEER WERK TOE

"U het verkies om nie te reageer op die ultimatum om op Vrydag 11 Januarie om 13h30 terug te keer werk toe nie.

U word derhalwe in kennis gestel dat u op Maandag 14 Januarie op die normale invaltyd moet aanmeld vir werk.

Hierdie is 'n finale kennisgewing."

[15] Despite this unequivocal and final ultimatum, and despite having had the weekend to reflect on it and to seek advice from their trade union, the workers persisted with their unprotected strike. On 15 January they were issued with notices to attend a disciplinary hearing on 17 January. Steytler informed the union on 15 January that the hearings would take place on 17 January. The workers did not attend. Neither did their trade union representative. The hearings proceeded in their absence. It was chaired by a human resources practitioner, Andries Laker. He recommended dismissal. The employer accepted the recommendation and dismissed the workers on 21 January 2013.

Evaluation

[16] The respondent locked the workers out on 8 January 2013. As Mr Steytler explained to them, the lockout was in response to their unprotected strike. It was a protected lockout in terms of s 64(3)(d) of the LRA.

[17] It is quite evident – and indeed, common cause – that the workers were not dismissed on 8 January, but on 21 January. Ms *Isaacs* conceded as much. They were locked out on 8 January. The respondent lifted that lockout two days later, on 10 January. Any misconception that the workers and the union may have had that their services had been terminated on 8 January, was quickly and unequivocally dispelled by the employer. Not only did Steytler make it clear to CSAAWU that the workers should return to work, he also sent a number of messages to the workers directly, inviting them to return to work. Then he issued ultimatums instructing them to go to work. They could not possibly have laboured under the impression that they had been dismissed. They were

represented and advised by CSAAWU throughout. Ms *Isaacs* conceded that the union conveyed to its members that they had not been dismissed on 8 January. Yet the union did not withdraw the referral of 8 January alleging an unfair dismissal on that date; neither did it refer a fresh dispute to the CCMA after the actual dismissal on 21 January.

[18] The Labour Appeal Court has made it clear that conciliation is a prerequisite for this Court to entertain a dispute before it. If it has not been conciliated, this Court has no jurisdiction. In *Intervalve (Pty) Ltd v NUMSA*[7] Waglay JP commented:

"The dispute between the parties is one of dismissal based on participation in a non-procedural strike. In terms of s191 of the LRA, such disputes must firstly be referred to conciliation within 30 days of the date of the dismissal (although the non-compliance with the 30 days' time limit may be condoned on good cause shown) and, if the matter remains unresolved after conciliation, the dispute must be referred for adjudication to the Labour Court and this must be done within 90 days after a certificate of non-resolution of the dispute at conciliation is issued.

...

Based on the non-referral of the dispute for conciliation and relying on the judgment of this Court in *National Union of Metalworkers of South Africa v Driveline Technologies (Pty) Ltd* ("*Driveline*"),[8] Intervalve and BHR aver that the Labour Court has no jurisdiction to entertain a dispute between NUMSA and them. In *Driveline,* Zondo AJP (as he then was) with Mogoeng AJA (as he then was) concurring held that:

"… the wording of section 191(5) imposes the referral of a dismissal dispute to conciliation as a precondition before such a dispute can either be arbitrated or referred to the Labour Court for adjudication."[9]

[19] Waglay JP concluded that, absent a referral of that dispute to conciliation (even though a dispute arising from the same strike involving other employers had been conciliated), the Labour Court had no jurisdiction.

[20] He continued:[10]

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[7] [2014] ZALAC 10 (26 March 2014) paras [12] – [14].

[8] (2000) 21 *ILJ* 142 (LAC).

[9] At 160A.

[10] At paras [23] – [24].

"Finally, on the issue of [a] constitutional right to have a day in court; this right is not to be exercised at a litigant's pleasure. The Act is clear. It makes provisions which must be complied with. There is nothing unconstitutional about that. One cannot fail to comply with the steps that are required to be followed to enforce a right and then complain that these steps which you have failed to follow now impinges your constitutional right, particularly when there is a right to purge that failure and no steps are taken or properly taken to purge the failure. When NUMSA failed to refer the dispute to conciliation timeously, it applied for condonation for its late referral which was not granted but NUMSA did not challenge this refusal. In these circumstances, it cannot be said they are being denied their day in court.

... In the absence of conciliation, [the trade union] is not entitled to refer its dispute for adjudication to the Labour Court as provided in s191(5). The Labour Court does not have jurisdiction to entertain the dispute, and as such it serves no purpose to consider whether the application for joinder has merit."

[21] The same considerations apply to the case before me. Ms *Isaacs* conceded that the applicants allege that they were unfairly dismissed on 21 January 2013. That dispute has not been referred to conciliation. This Court has no jurisdiction to hear it.

Costs

[22] This Court has a discretion, in law and fairness, to award costs.[11] The applicants persisted with their referral when the point *in limine* was raised by the respondent, albeit belatedly. Their counsel conceded, quite properly, that her clients were dismissed, not on 8 January (as stated in their referral) but on 21 January. Yet they persisted. This intransigent attitude is also clear from the refusal of the workers and the union to stop the unprotected strike. The employer gave them numerous opportunities to return to work. They refused. There is no reason in law or fairness why the employer should not be entitled to its costs. The workers may be indigent. The union is not. Should the workers be unable to pay, the union – that has been actively involved and representing the applicants throughout – should do so.

[11] LRA s 162.

Order

The referral is dismissed due to lack of jurisdiction.

The applicants are ordered to pay the respondent's costs, including the costs of counsel, jointly and severally, the one paying, the other to be absolved.

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A J Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS:	Yvette Isaacs Instructed by Brink & Thomas.
RESPONDENT:	Michael Crowe SC Instructed by Bagraims attorneys.