



REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: JS 552/12

In the matter between:

NEHAWU OBO MULOIWA & ANOTHER

Applicant

and

UNIVERSITY OF VENDA

Respondent

Heard: 22 July 2014 (in chambers)

Delivered: 24 July 2014

Summary: Unprotected strike -- alleged automatically unfair dismissal – stated case – dismissal for misconduct – not unfair.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant union, NEHAWU, represents two of its members who were dismissed by the respondent, the University of Venda. Their dismissal flows from their conduct during a strike in 2010. The union says the strike was protected; the university says it was unprotected. The union claims

that the dismissal of the two employees, NC Muloiwa and SE Mukhuvhukhuvu, was automatically unfair in terms of section 187(1)(a) of the Labour Relations Act.¹ The university says they were fairly dismissed for misconduct.

- [2] The matter was initially said down for trial on 5 and 6 June 2014. When the parties appeared at court, the legal representatives agreed that the matter should be determined on the basis of a stated case. They further agreed to file written submissions by 30 June 2014; and to reply to those submissions by 14 July 2014. The union's counsel sought an extension to deliver replying submissions by 21 July 2014. It was granted.

Background facts

- [3] The two employees were NEHAWU shop stewards. They both worked in the University library. They were dismissed on 8 September and 3 December 2010 respectively.
- [4] The statement of admitted facts agreed between the parties records the following:²

1. **“ First period of industrial action (2 February to 9 February 2010)**

1.1 The parties entered into a recognition agreement on 18 June 2008. (A copy of the recognition agreement is in the applicant's bundle at page 1).

1.2 On 26 January 2010, the applicant [i.e. the union] referred a dispute to the CCM A. In terms of the referral form the nature of the dispute was identified as “unilateral change to terms and conditions of employment” and facts of the dispute were recorded as “the employer has changed the conditions of workers (benefits) without negotiating/consultation with the union + refused to implement workers' demands”. In terms of the referral notice the outcome required by the union was “the

¹ Act 66 of 1995.

² I have replaced references to “the applicant” with “the union” and references to “the respondent” with “the university”.

employer not to implement the changes and restore to the original conditions and management to implement our demands". (A copy of the referral notice is in the union's bundle at page 58).

1.3 On 27 January 2010 the union issued the University with a notice of intention to strike. The notice stated inter alia that –

‘the workers voted for industrial action and demanded that:

- 48 hours' notice should be given to management
- management should restore their original conditions of employment
- management should stop to implement the unilateral changes; and that
- management should implement staff demands as submitted.

The industrial action is scheduled to start on 2 February 2010 starting from 08h00’.

(A copy of the notice is in the union's bundle at page 63).

1.4 The University could not concede to the union's demands and, as a result, the union and its members embarked on the industrial action [i.e. the strike].

1.5 The University launched an urgent application at the Labour Court wherein it claimed in the strike was unprotected. (A copy of the urgent application is in the University's bundle at page 1).

1.6 The court granted an interim order on 8 February 2010. The return date was 12 March 2010. The interim order ordered the applicant and its members to inter alia cease their strike action and to return to work.

(The full terms of the order are set out in the interim order which is in the union's bundle at page 68. It reads as follows:³

³ I have replaced "the Respondent" with "the union". Otherwise I quote verbatim from the interim order without interfering with references to the strike being "unlawful" or "illegal". I accept, for

1. 'It is declared that the industrial/strike action in which the union's members are engaged is unlawful and unprotected.
 2. The union and its members are interdicted and restrained from embarking on an illegal strike and on work stoppages or sit ins at any of the University premises.
 3. The union and its members are interdicted and restrained from harassing and intimidating lecturers, management, and other staff members at the University and thus disrupting normal University activities.
 4. The union and its members are interdicted and restrained from preventing officials and staff members from conducting the business of their employer (the University).
 5. The union and its members are interdicted and restrained from instructing the University's staff members not to report for duty."
- 1.7 On the return date, 12 March 2010, the court postponed the matter to 23 April 2010 and extended the interim order to 23 April 2010. On 23 April 2010 the matter was postponed to 4 June 2010. (A copy of the order extending the interim order is in the union's bundle at page 79).
- 1.8 On 9 February 2010, a meeting was held between the union and the university's management. The parties agreed that the union would isolate the policies that it wanted to make input on and forward them to management. The union submitted a list of 16 policies to the University. The University's management requested that the union indicate specific problems on the various policies. The union submitted a list of 13 policies and the comment about certain issues.
- 1.9 On 16 February 2010, the union refused to discuss the policies until the parties agreed on the list of consultative teams for each party as well as on terms of reference. A list of the management team was given to the union at the meeting but still the discussion on the policies could not proceed.

1.10 on 25 February 2010, at another scheduled meeting, the union again indicated that they were not prepared to talk about the substantive issues unless the parties agree to terms of reference. Management at all these meetings indicated that the terms of reference are the issues raised by the union in the 13 policies that the union has listed. At this meeting, the parties agreed that at the following meeting scheduled for 4 March 2010, the parties would start the consultative process on the issues raised by the union.

1.11 On 3 March 2010, the union sent a memorandum to management postponing the meeting scheduled for 4 March 2010 and requested a private meeting with the Vice Chancellor instead. The Vice Chancellor could not meet with them due to other commitments, and the meeting was subsequently rescheduled to 10 March 2010.

1.12 The CCMA referral of 26 January 2010 was sent down for conciliation on 5 March 2010. The parties made an agreement at the CCMA. The parties agreed to extend the period of conciliation.

1.13 The commissioner did not issue a certificate of outcome on 5 March 2010.

2.. **Second period of industrial action (23 March 2010 to 4 June 2010)**

2.1 On 23 March 2010, the University received a certificate of outcome in relation to the dispute referred to the CCMA on 26 January 2010. (A copy of the certificate of outcome is in the University's bundle at page 141).

2.2 on 23 March 2010 the University received the union's notice of intention to strike, commencing 25 March 2010.

2.3 On 25 March 2010 the union and its members went on strike.

2.4 The individual applicants, Mr Muloiwa and Mrs Mukhuvukhuvu were dismissed on eight November 2010 and 3 December 2010 respectively.

3. The charges of Muloiwa that related to the strike action are:

- Charge one

Gross misconduct: contravention of clause 1.1 (s) of the University of Venda staff disciplinary procedure manual.

You are charged with gross misconduct in that, on or around 9 February 2010 you led a strike action which was interdicted by the Labour Court on 8 February 2010. You failed to comply with an interim Labour Court interdict which interdicted prevented you from continuing with the strike action as well as sit-ins in the University premises until the return date which was 12 March 2010 and as a result your conduct was improper and unfitting and in contravention of clause 1.1 (s) of the University of Venda disciplinary procedure manual.

- Charge two

Gross misconduct: contravention of clause 1.1 (s) of the University of Venda staff disciplinary procedure manual.

You are charged with gross misconduct in that on or around⁴ 9 February 2010 you addressed NEHAWU members at an unauthorised meeting or gathering which was held at the University Stadium at or around 08h30. In view of the above your conduct was improper and unfitting and in contravention of clause 1.1 (s) of the University of Venda disciplinary procedure manual.

- Charge three

Gross misconduct: contravention of clause 1.1 (c) of the University of Venda staff disciplinary procedure manual.

You are charged with gross misconduct in that, on or around 9 February 2010, he defied or ignored the instructions from the office of the Vice Chancellor and principal that you must go back to your workstation since the strike that you and your members had embarked on have been interdicted by the Labour Court until the return date which was 12 March 2010. In view of the above you

⁴ This is the vague and unnecessary way in which the charges, akin to charges in a criminal court, were drafted. It is in fact common cause that it was meant to refer to alleged misconduct on 9 February 2010.

have disobeyed, disregarded or wilfully defaulted in carrying out a lawful order given to you by the Vice Chancellor and principal. You have therefore by word or conduct displayed insubordination in contravention of clause 1.1 (c) of the University of Venda staff disciplinary procedure manual.

- Charge four

Gross misconduct: contravention of clauses 1.1 (s) and (c) of the University of Venda staff disciplinary procedure manual.

You are charged with gross misconduct in that on or around 25 March 2010 you addressed NEHAWU members at an unauthorised meeting or gathering which was held at the University Stadium at or around 08h30. In view of the above your conduct was improper and unfitting and in contravention of clause 1.1 (s) of the University of Venda disciplinary procedure manual.

- Charge six

Gross misconduct: contravention of clause 1.1 (c) of the University of Venda staff disciplinary procedure manual.

You are charged with gross misconduct in that on or around 25 March 2010 you defied or ignored the instruction from the office of the Vice Chancellor and principal that you must not embark on an illegal and unprotected strike that you and your members have restarted since it had been interdicted by the Labour Court until the return date which was 23 April 2010. Despite the instruction from the office of the Vice Chancellor and principal you decided to go ahead with your unlawful and unprotected strike action. In view of the above conduct, you have therefore by word or conduct displayed insubordination in contravention of clause 1.1 (c) of the University of Venda staff disciplinary procedure manual.

- Charge seven

Gross misconduct: contravention of clause 1.1 (s) of the University of Venda staff disciplinary procedure manual.

You are charged with gross misconduct in that on or around 5 May 2010 you addressed NEHAWU members at an unauthorised meeting or gathering which was held at the University Stadium at or around 13h00. In view of the above your conduct was improper and unfitting and in contravention of clause 1.1 (s) of the University of Venda disciplinary procedure manual.

4. The charges of Mukhuvukhuvu that relate to the strike action are:

- Charge one

Gross misconduct: contravention of clause 1.1 (s) of the University of Venda staff disciplinary procedure manual.

You are charged with gross misconduct in that, on or around 9 February 2010 you led a strike action which was interdicted by the Labour Court on 8 February 2010. You failed to comply with an interim Labour Court interdict which interdicted prevented you from continuing with the strike action as well as sit-ins in the University premises until the return date which was 12 March 2010 and as a result your conduct was improper and unfitting and in contravention of clause 1.1 (s) of the University of Venda disciplinary procedure manual.

- Charge two

Misconduct: contravention of clause 1.1 (s) of the University of Venda staff disciplinary procedure manual.

You are charged with gross misconduct in that on or around 8 February 2010 you invited all NEHAWU members to an unauthorised meeting or gathering which was held at the University stadium on 9 February 2010. In view of the above your conduct was improper and unfitting and in contravention of clause 1.1 (s) of the University of Venda disciplinary procedure manual.

- Charge three

Misconduct: contravention of clause 1.1 (c) of the University of Venda staff disciplinary procedure manual.

You are charged with gross misconduct in that, on or around 9 February 2010, you defied or ignored the instructions from the office of the Vice Chancellor and principal that you must go back to your workstation since the strike that you and your members had embarked on have been interdicted by the Labour Court until the return date which was 12 March 2010. In view of the above you have disobeyed, disregarded or wilfully defaulted in carrying out a lawful order given to you by the Vice Chancellor and principal. You have therefore by word or conduct displayed insubordination in contravention of clause 1.1 (c) of the University of Venda staff disciplinary procedure manual.

- Charge six

Misconduct: contravention of clause 1.1 (c) of the University of Venda staff disciplinary procedure manual.

You are charged with gross misconduct in that on or around 25 March 2010 you defied or ignored the instruction from the office of the Vice Chancellor and principal that you must not embark on an illegal and unprotected strike that you and your members have restarted since it had been interdicted by the Labour Court until the return date which was 23 April 2010. Despite the instruction from the office of the Vice Chancellor and principal you decided to go ahead with your unlawful and unprotected strike action. In view of the above conduct, you have therefore by word or conduct displayed insubordination in contravention of clause 1.1 (c) of the University of Venda staff disciplinary procedure manual.

- Charge seven

Misconduct: contravention of clause 1.1 (s) of the University of Venda staff disciplinary procedure manual.

You are charged with gross misconduct in that on or around 25 March 2010 you failed to comply with an interim Labour Court interdict which interdicted prevented you from continuing with the strike action as well as said ins in the University premises until the

return date which was extended to 23 April 2010. In view of the above your conduct was improper and unfitting and in contravention of clause 1.1 (s) of the University of Venda disciplinary procedure manual.

5. The applicants admit all other charges that they were charged and dismissed for other than the charges listed in 3 and 4 above. The applicants submit the finding of dismissal in respect of the misconduct charges unrelated to the strike were harsh.”
- [5] The parties further agreed that “the judge will determine the matter on the basis of the statement of admitted facts, the pleadings and documentary bundles, the written submissions and the replies to the written submissions.”
- [6] The following pertinent facts become clear from the above:
- 6.1 The “strike related” charges or flow from the events on 9 February and 25 March 2010.
- 6.2 This court declared the strike action to be unprotected in an interim order issued on 8 February 2010. The rule nisi was extended to 23 April 2010. It was not discharged.⁵ Therefore, the events of 9 February and 25 March 2010 took place while this court had declared the strike to be unprotected.
- 6.3 The primary reason for the dismissal of the two employees was their misconduct during the unprotected strike. Muloiwa’s misconduct comprises his “leading” the strike on 9 February while it was interdicted and having been declared unprotected; addressing NEHAWU members at an unauthorised meeting on the same day; and ignoring the instructions from the Vice Chancellor to go back to work. He also addressed NEHAWU members at an unauthorised meeting on 25 March 2010; ignored the instruction from the Vice Chancellor to stop the unprotected strike on that day; and contravened the court order by continuing with the unprotected strike

⁵ The University eventually withdrew the application on 25 May 2010 following a settlement and after the strike had been called off.

on that day. Mukhuvukhuvu committed misconduct by leading the strike on 9 February and contravening the court order; inviting NEHAWU members to the unauthorised meeting on nine February; ignoring the instructions from the Vice Chancellor to return to work and continuing with unprotected strike; continuing with the unprotected strike on 25 March 2010; and contravening the court order on that date.

- [7] It is further common cause that the employees did not attend their disciplinary hearings. The disciplinary committee found that they had committed the misconduct in question and they were dismissed.

Legal principles

- [8] The applicable legal principles regarding dismissals and industrial action are codified in item 6 of schedule 8 to the LRA, the Code of Good Practice: Dismissal.

“(1) Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including –

- (a) the seriousness of the contravention of this Act;
- (b) attempts made to comply with this Act; and
- (c) whether or not the strike was in response to unjustified conduct by the employer.

(2) Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the cause 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 the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with it.”

- [9] However, the two employees in question were not dismissed simply for participating in the unprotected strike. They were dismissed for misconduct

in terms of the university's disciplinary code. Although their misconduct stems from the unprotected strike, the charges against them were more specific. In essence, they comprise the following:

- 9.1 leading the strike action in contravention of a court interdict;
- 9.2 addressing NEHAWU members at two unauthorised meetings or inviting the whole members to attend those meetings;
- 9.3 ignoring instructions from the Vice Chancellor.

[10] The question then is whether the university had proven that the two employees had committed the misconduct in question; and if so, whether their dismissal was fair.

Evaluation

[11] Mr *Naidoo*, for the union, attempted to argue that the strike was protected. That argument cannot be entertained. This court had issued an order that the strike was unprotected. That order was never discharged. I will not overrule an earlier order of this court on the same issue.

[12] In any event, it is clear that the strike was unprotected. The union did not follow the dispute resolution procedure set out in the recognition agreement before striking; it did not follow the procedure set out in section 64 of the LRA before the strike started on 2 February 2010; and thus the court declared it to be unprotected.

[13] It then follows that the employees committed misconduct by their very participation in the unprotected strike. The further misconduct that they were charged with must be evaluated against that background.

[14] The employees defied an order of this court. That aggravates their misconduct. They continued with their actions, knowing full well that the unprotected strike had been interdicted. Despite that, they continued with the strike; invited the union's members to attend unauthorised meetings during the strike and address those meetings; and, when the Vice Chancellor instructed them to cease their unprotected actions and to return to work, they defied those instructions. There can be no doubt that all of these actions constitute gross misconduct.

[15] The evidence before the disciplinary committee was uncontradicted. That evidence displayed clear instances of gross misconduct and of contraventions of the university's staff disciplinary procedure manual. The disciplinary committee recommended that the employees be dismissed. The Vice Chancellor, Prof PA Mbatia, considered that recommendation and all the evidence. He decided to dismiss the employees. On the clear evidence of gross misconduct before the disciplinary committee and considered by the Vice Chancellor, that is a fair sanction.

The remaining charges

[16] Both employees admit that they committed the misconduct complained of in the remaining charges. They nevertheless argue that dismissal was too harsh a sanction. These charges arise from the Muloiwa's participation in unauthorised meetings on 29 April, 5 May and 18 May 2010; and Mukhuvukhuvu inviting union members to the meetings on 29 April and 5 May 2010.

[17] On the admitted charges, Muloiwa admits that he wilfully disobeyed orders by the Vice Chancellor; that he breached the University's staff disciplinary procedure manual by addressing union members at an authorised meetings on three occasions; and that he breached the conditions of his suspension. Mukhuvukhuvu admits to various contraventions of the disciplinary procedure manual. Inter alia, she admits that she wilfully disobeyed a lawful order given to her; and that she behaved improperly and unfittingly by inviting the union's members to unauthorised meetings on three occasions. She also admits to having breached the conditions of her suspension on various occasions.

Procedural fairness

[18] The employees, both of whom are NEHAWU shop stewards, chose not to participate in their disciplinary hearings. They failed to make use of the opportunity to place any evidence before the disciplinary committee, either contesting the misconduct or its seriousness; or to place mitigating factors before the hearing.

Conclusion

[19] The misconduct, most of which is admitted by the employees, is serious. They contravened an order of this court. They proceeded to incite members of the union to continue with their participation in a strike that had been declared unprotected and interdicted by this court. They disobeyed reasonable instructions by their employer. After they had been suspended, they contravened the terms of the suspension. They have shown no remorse. In their capacity as shop stewards, they exacerbated the actions of their members in continuing with the unprotected strike. The disciplinary committee found that their misconduct rendered the continued employment relationship intolerable. On that basis the employees were dismissed. That was a fair sanction.

[20] Both parties asked for costs to follow the result. I see no reason in law or fairness to disagree.

Order

The applicants' referral is dismissed with costs.

A J Steenkamp
Judge

APPEARANCES

APPLICANT:

Moksha Naidoo
Instructed by Majang Inc.

RESPONDENT:

Khomotso Makapane. And Samantha Coetzer of
Bowman Gilfillan.

LABOUR COURT