REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable/ Not of interest to other Judges.

Case no: JS 905/11; JS1094/11; JS89/12

In the matter between:

MANDLA ZUNGU AND 6 OTHERS **Applicants**

and

PRE-PLAN INTERNATIONAL (PTY) LTD **Respondent**

Heard: **22 and 23 August 2013 and 15 and 16 September 2014**

Delivered: **14 October 2014**

Summary: **Dismissal as a result of participation in an unprotected strike. Dismissal unfair. Reinstatement ordered.**

JUDGMENT

AC BASSON, J

[1] The individual applicants contended that their dismissals for having participated in an unprotected strike were substantively and procedurally unfair. There were

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seven applicants before Court: Mr. Mfiki, Mr. Malete, Mr. Masoka, Mr. Mbabini, Mr. Mhlahlo, Mr. Zungu and Mr. Molala. Initially these individuals referred disputes to this Court under different case numbers. Three of these matters were consolidated. Zungu elected to be the spokesperson on behalf of the applicants. He, however, elected not to give evidence despite the fact that he is one of the applicants. Although only these applicants were before Court, it appears from the evidence that the whole workforce consisting of approximately 80 workers, were dismissed as a consequence of the unprotected strike. I will also point out, herein below that some of these dismissed workers have been re-employed at some stage after the initial dismissal.

[2] At the commencement of the proceedings I dealt with an application for condonation for the late referral of the dispute to this Court. The referral is two months out of time. I have considered the application and I have granted condonation. The matter thereafter proceeded on the merits.

Brief exposition of the relevant facts

[3] It is clear from the papers that the applicants were required to work short time as from January 2011. It also appears from the evidence that the implementation of the short time was one of the issues that gave rise to some unhappiness in the workplace. Due to the short time employees usually knocked off at 13H00. Some dispute existed regarding the short time issue and it was the contention of the applicants that the implementation of the short time was "illegal" and that the workers were not consulted about the short time. The evidence before the Court, however, suggests otherwise. On 31 January 2011, in a letter to the secretary of the Bargaining Council, the Trade Union (NUMSA) and the individual applicants were advised of the reasons for the short time as well as the short time table which would have been effective from 9 February 2011. Mr. Grover (the Industrial Relations Manager (on a part time basis)) explained in his evidence that he contacted the Bargaining Council before short time was implemented to ensure that the respondent would follow the correct procedures in implementing the short time. On 3 February 2011 the Bargaining Council faxed a letter from Ms Charlene Hassen confirming receipt of the correspondence. The letter is unsigned and

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much was made about this by Zungu. Nothing turns on the fact that the letter was unsigned despite the fact that Zungu went as far as to say these letters were fraudulent.

[4] On the evidence I accept that the Bargaining Council was properly informed of the implementation of short time. Moreover, I accept that these letters were sent not only to the Bargaining Council but also to the Union and the individual employees. Further similar letters were sent to the Bargaining Council thereafter and to the Union and the individual applicants.

Events of 19, 20 and 21 April 2011

[5] It was common cause that the applicants (and the rest of the workforce) submitted a grievance (handwritten letter) to a certain Esther at about 9H00 who in turn handed it over to Mr Eugene Delport (hereinafter referred to as "Delport") who is the Factory Manager of the respondent. The letter contained various scurrilous allegations against Delport as well as other general grievances: (i) Delport is a racist. (ii) Workers only receive a "government increase" but not a company increase. (iii) Some employees are not paid their lawful rates. (iv) Delport does not listen to any black employees. (v) Delport told some workers that "you are kaffirs" (vi) Delport swears at employees. (vii) Delport treats workers as machines. (viii) Delport bribed one of the NUMSA union members. The memorandum ends with the following threat:

> "As mentioned above we therefore conclude by saying that as pre-plan workers we want Eugene Delport out of this company or we will take necessary action for a long as he remains with this company. We would like to have our response before 12H00 19/04/2011. If not, necessary action will be taken by all employees with regard to the late response as dated above".

[6] With reference to the overtime issue, Delport explained that the respondent operated within the jurisdiction of the Metal and Engineering Industries Bargaining Council (the "MEIBC") and that it paid the rates prescribed by the Council. He also confirmed that the respondent had been working short time for quite some time. With reference to documentation he explained that the MEIBC was informed every time when they had to work overtime to ensure that the respondent acted within the law in implementing short time. Every time a

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notification of short time was sent out, the notice was copied to the secretary of the Regional Bargaining Council, the Trade Union and the individual employees.

[7] In respect of the memorandum containing the grievances, Delport confirmed that he received the memorandum on the morning of 19 April 2011. Regarding the allegations that he was a racist, he was emphatic in his denial that he was a racist and added that racism was not tolerated in the company.

[8] After receipt of the memorandum Delport went to the factory to address all the workers. He also informed them that the Managing Director was not available as he was out of the country and that the grievances would only be addressed on 21 April 2010 upon his return. According to Delport the workers then decided not to work despite an instruction from him to work until 13H00 (which was their knock off time).

[9] Delport then communicated with the IR Manager. Mr. Grover. Grover told him to inform the workers that he will be at the factory on 20 April 2010 to address them and that they had to select three workers to represent them. Delport informed the workers about the arrangements however the workers did not resume their work. The workers also refused to select representatives to talk to Grover.

Events of 20 April 2010

[10] According to Delport the workers did report for duty on 20 April 2010 but refused to commence work. He testified that he instructed them to start working and informed them that if they did not their actions would be regarded as an illegal strike which could result in disciplinary action and may result in their dismissal. The workers refused.

[11] Delport then phoned the Union (NUMSA) and spoke to a certain Tshabalala. Tshabalala told Delport that he could not come to the respondent as he had tried to speak to the workers but that they had refused to talk to him. Tshabalala also told Delport that the workers had accused him of taking bribes. Delport then phoned Mr. Vusi from the Union and explained the situation to him. Vusi then requested to speak to the workers. Delport handed his phone to him and Vusi then spoke to one of the workers. Despite having left various messages for Vusi, Delport never again heard from him.

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Meeting with the workers on 21 April 2011

[12] Delport explained that he and the Managing Director had a meeting with three employees (Zungu, Makhuna and Mavuso). The minutes of the meeting were introduced into evidence. The owner of the business and Managing Director Mr. Antonio de Magalhaes requested the workers to go back to work and carry on with their normal duties. According to Delport the workers did not want to carry on with their normal duties. It is reflected in the minutes that the meeting was told that the workers were not engaged in a strike but that it was a "sit down". The representatives also told the meeting that Delport did not treat the workers well. At the meeting the workers were informed that they were suspended and that they had to attend a disciplinary hearing on 5 May 2011.

[13] The meeting was followed up with a letter addressed to the aforementioned three employees. The minutes of the meeting were attached to this letter. In this letter the workers were informed that the respondent regarded their actions as an illegal strike.

[14] According to Delport the workers were therefore aware of the fact that they would be handed notices to attend a hearing at 13H00 on that day. In the stead the workers clocked out at 12H50 and went home. The workers were therefore not at work since 21 April 2011 until 5 May 2011. He explained that the respondent's factory was closed over this time for the Easter weekend and the various public holidays. He explained that the workers had returned to work on 5 May and that he then informed them that the disciplinary hearing was postponed to 9 May 2011. He explained that he was advised by Grover to postpone the hearings because the workers were not given sufficient notice.

[15] Delport testified that during the strike the workers also pushed a vehicle to the premises and that they had barricaded the main entrance to the premises so that nobody could enter or exit the premises. Because the situation got out of hand the police was called. Before the police arrived the workers also tried to enter the premises by the reception area. Delport, the Managing Director and the Financial Director then locked the security gates. Photos were also handed in depicting the workers outside of the reception area. Ms Jessica Merlush confirmed that she was a secretary and that the workers had tried to enter the reception area.

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[16] Delport confirmed that a disciplinary hearing was held on 9 May 2011 and that the workers did not attend. The workers were subsequently dismissed. He explained that the workers were dismissed because they were on an illegal strike and did not adhere to warnings to return to work or face disciplinary action. He also explained that they were scared when the workers approached the reception area and that their lives were threatened.

[16] An important aspect of Delport's evidence was his explanation as to how the factory operated *after* the dismissals. He confirmed that the entire staff component had participated in the strike (approximately 85 employees) and that the entire workforce was thereafter dismissed. After the dismissals the respondent, however, re-employed some of the dismissed employees. He admitted that they re-employed approximately 30 of these dismissed employees. He explained that everyone was contacted and that they re-employed those who had applied for the jobs. In respect of the individual applicants, Delport explained that there was a problem in re-employing the individual applicants because they had disciplinary warnings and that they showed "*their hardness towards the company and no willingness to work within the company*". On this issue I must point out that Grover gave contradictory evidence. His evidence was that because some employees appealed their dismissals, they were taken back. (I will refer to his evidence herein below.)

[17] Mr De Magalhaes also testified. I do not intend summarizing his evidence in detail. Save to state that he confirmed salient aspects of the evidence of Delport regarding the meeting that was held, the attempts made by the employees to enter the reception area and their blockage of the driveway at the entrance of the premises. He also confirmed that the workers were dismissed *in absentia*.

[18] Grover, the chairperson of the disciplinary hearing also testified. At the time he was the Industrial Relations Manager of the respondent on a part-time basis. He explained that he came to the workplace on 20 April 2011 to speak to all the workers. He explained that he tried to have a meeting with the workers but that they had refused to speak to him. They also refused to send a shop steward to meet with him. He explained that he took the decision to dismiss the applicants with reference to the disciplinary records of every employee. He also explained

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that the workers had no reason to feel aggrieved because the wages were based on the increments negotiated at the Bargaining Council. Wages of the employees of the respondent were therefore adjusted accordingly. He also explained that if there were grievances regarding Delport's conduct towards the black employees, they should have lodged a grievance. He confirmed that no such grievances were ever filed. Grover also confirmed that short time was implemented in consultation with the Bargaining Council and that the respondent had informed the Bargaining Council whenever short time was implemented. He also confirmed that he had the impression that the workers would not return to work unless Delport was kicked out of the company. Grover also explained that the relationship between the parties had deteriorated quite rapidly during the strike.

[19] Grover confirmed that the employees had arrived at work on 5 May 2011. On that day they were issued with notifications to attend a disciplinary hearing. They were charged, *inter alia*, with participating in an illegal strike. The disciplinary enquiry was postponed to 9 May 2011 because Grover was of the view that the employees did not have sufficient notice of the hearing. The hearings were conducted in their absence because the employees did not attend. Grover explained that he took the decision to dismiss the employees with reference to the disciplinary records of each and every one of them. Extensive reference was also made in Court to the disciplinary records of each of the employees.

[20] Mr Kamte testified on behalf of the applicants. He merely confirmed that they wrote in a letter that Delport was a racist and explained that it was their only option to complain to Delport because their Union did not assist them. He also confirmed that their Union took bribes and that they could not approach the Union. He denied that they wanted Delport to be fired although they stated as much in their letter. According to him they did not strike but worked until knock-off time. He denied that they were unruly and stated that they merely sat outside. He confirmed that the workers did not want to discuss issues with Grover because they perceived him to be a lawyer. On this point I must point out that Grover was adamant that he was not a lawyer and that he was always available to discuss issues pertaining to the workplace with the employees. Mr Malete

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confirmed that their grievances were given to the respondent. He also testified that they were not on strike but that they were working.

Evaluation of the merits

[21] Participation in industrial action that does not comply with section 68(5) of the Labour Relations Act[1] ("the LRA") constitutes misconduct and may constitute a fair reason for an employer to dismiss an employee:

> "Participation in a strike that does not comply with the provisions of the Chapter, or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal. In determining whether or not the dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account."

[22] In the present matter the applicants alleged that they did not participate in a strike but that their actions were merely a "sit down". I am not persuaded on the evidence that the employees did not participate in a strike. The evidence of Delport and De Magalhaes was clear and I can find no reason to reject their evidence on this aspect. Furthermore, why would the issue of not tendering their services be discussed at a meeting and recorded in the minutes if the employees did not strike?

[23] It is trite, however, in our law that the mere fact that an employee participates in a strike does not as a matter of course entitle an employer to dismiss. What the Court must do in assessing whether there was a fair reason to dismiss is to consider all relevant factors pertaining to the strike as well as the degree of contravention of the procedural requirements for a strike to be protected. Regard must also be had to what had prompted the industrial action.

[1] Act 66 of 1995.

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Was dismissal an appropriate sanction?

[24] Although Delport seriously denied the allegations made against him, the fact that these allegations were made and the fact that it caused unhappiness amongst the workforce cannot be disregarded. Having said this, this Court is not making a finding in respect of the veracity of the claims of the allegations of racism. However, as already pointed out, the Court cannot disregard the fact that these allegations have been made. In respect of the grievances, I have perused the minutes of the meeting held on 22 April 2011. There is nothing in these minutes to suggest that the respondent made a real effort to address these concerns. What the respondent did was to inform the workers that they should go back to work and address their grievances through the correct channels. Although there is some merit in the approach followed by the respondent, it cannot be disregarded that the employees were on strike and that they were obviously unhappy about their grievances. At the very least one would have expected the respondent to make a greater effort to address these concerns particularly during the occurrence of a strike.

[25] Clause 6 of Schedule 8: CODE OF GOOD PRACTICE: DISMISSAL states the following in respect of dismissal for participation in an unprotected strike:

> "6. Dismissals and industrial action.—
>
> (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

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(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 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 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 them."

[26] Apart from the fact that I am of the view that the respondent should have done more to defuse the situation by addressing the employee's grievances more actively, I also have some difficulty with the manner in which the respondent managed the strike. I accept the evidence that the Delport did contact the Union and that the employees were not amenable to any assistance from the Union. I also accept the fact that Delport made some attempts to warn the workers that they were on strike and that there would be consequences should they not return to work. It is clear from the evidence that no written ultimatum was ever issued to the workers setting out in clear an unambiguous terms the consequences for not complying with the ultimatum. Furthermore, Delport's evidence in respect of the verbal ultimatums given to the employees was vague. He testified that he told them that what they were doing is *"incorrect and that they could face disciplinary action"*. On the evidence before this Court it cannot be concluded that the applicants were given a proper ultimatum. It is also not clear from the evidence how much time the employees were given to reconsider their positions. What is clear is that there was no love lost between the employees and the Union. The employees therefore did not have the opportunity to consult with a Union. However, they nonetheless ought to have been given sufficient time to

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reconsider their actions. The Court also cannot ignore the fact that the employees only worked until 13H00 every day. Furthermore, the minutes reflect that the employees were informed at the meeting held on 21 April 2011 (the very next day) that they will be handed notifications to attend hearings. In conclusion therefore I am not persuaded that the employees had received a fair ultimatum.

[27] I must point out that I did consider the fact that the grievance letter gives the impression that the workers would refuse to work unless Delport is dismissed.[2] This was, however, not the only grievance raised in the letter. Furthermore, this demand merely reflects on the lawfulness of the strike. I have already pointed out that I am of the view that the individual applicants did partake in a strike. The

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[2] See: *TSI Holdings (Pty) Ltd and others v NUMSA and others* [2006] JOL 16949 (LAC) where the Labour Appeal Court held as follows: **"**[39] Now that I have found that the purpose of the respondents' concerted refusal to work was to compel the appellant to dismiss Mr Van Zyl, the next question for determination is whether or not such a demand was an unlawful one. I shall assume, without deciding, in favour of the respondents that it is permissible in our law for employees to engage in a concerted refusal to work in support of a demand that the employer dismiss an employee fairly. In this regard I have in mind the case of an employee who has been charged with, and found guilty of, misconduct that is sufficiently serious to render his dismissal fair but whom the employer decides not to dismiss. Let us say that employees found guilty of fraud have consistently been dismissed in a particular company for many years but in one case the employer decides that in a particular case he will not dismiss the employee because of some unacceptable reason such as that he is white and the others who had been dismissed for similar offences were black. Let us assume that the loss resulting from such fraud for the employer is a million rand. It seems that in such a case, if the employee was guilty of such serious misconduct that would, quite clearly, be a fair reason for his dismissal. In such a case it may well be that, if there was a disciplinary inquiry and such employee was found guilty of such serious misconduct but was not dismissed on such unacceptable grounds as racist grounds, a demand that the employer dismiss such employee cannot be said to be a demand for the employer to act unfairly. It may well be that in such a case it is arguable – and I put it no higher than that – that such a demand may form part of a protected strike."

strike was not protected for want of compliance with the procedural requirements as set out in the LRA.

[28] There is a further ground upon which I am of the view that the dismissal of the applicants was unfair. As already mentioned, Delport confirmed that the whole of the workforce was dismissed. To a question how the factory operated, Delport said that some employees applied for their jobs and that they were re-hired. He was very specific that the respondent contacted them and that the workers then collected the application forms from security. A total of about 30 employees were re-employed. He stated that he had a problem re-employing the applicants because of their *"hardness"* towards the company and *"a not willingness to work with the company"*. To a question whether those who were re-employed also any prior warnings his answer simply was: *"My Lady, I will say yes and no as well*". What then the reason was for re-employing some and not others is therefore unclear. Furthermore, Grover gave a contradictory version: According to him some employees were re-employed because they had appealed their dismissals. The respondent placed no evidence before the Court in respect of the appeal process and how that process unfolded. Grover was also of little assistance in that he was not involved in that process. On the evidence before this Court there are therefore two conflicting versions regarding the re-employment of about 30 employees: One from Delport and one from Grover. In the absence of evidence which properly justifies the re-employment of some over and above others, this Court cannot come to any other conclusion namely that the respondent acted unfairly. The circumstances under which some of or all of the employees were contacted were also not placed before this Court. The Court simply does not

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know why only some of the employees were taken back – particular in light of the conflicting versions.

[29] I have considered all the evidence and I am therefore of the view that the dismissal of the individual applicants for participation in an unprotected strike was unfair. I have decided to order the reinstatement of the applicants. Although I did take into account the conduct of the employees as a whole during the strike and the fact that no attempts were made from their side to raise their grievances at an earlier stage with the respondent and by not lodging a formal grievance against Delport for what they perceived to be racist conduct, I am nonetheless of the view that reinstatement is an appropriate remedy in the circumstances. I have, however, decided to impose on each individual applicant a final written warning for participating in an unprotected strike.

[30] In the event the following order is made:

30.1 Condonation for the late referral of the dispute is granted.

30.2 The dismissals of the individual applicants were unfair.

30.3 The respondent is ordered to reinstate the applicants retrospectively to the date of their dismissal without any loss of benefits.

30.4 Each applicant is issued with a final written warning for participating in an unprotected strike.

30.5 There is no order as to costs.

AC BASSON, J

Judge of the Labour Court

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Appearances:

For the applicants: Mr. Mandla Zungu.

For the respondent: Mr. C Levin of Clifford Levin Attorneys

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