Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT PORT ELIZABETH

Case No: P 05/14

P 06/14

In the matter between:

NATIONAL UNION OF MINEWORKERS	**First Applicant**
UNATHI STIMELE	**Second Applicant**
W TWALO & 10 OTHERS	**Third and Further Applicants**

and

ROBERTS BROTHERS CONSTRUCTION (PTY) LTD	**First Respondent**
MPUMULANGA CONSTRUCTION (PTY) LTD	**Second Respondent**

Handed down on 3 October 2017 in Johannesburg

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

LAGRANGE J

Introduction

[1] The respondents in this matter have applied for leave to appeal the judgement handed down on 4 April 2017. I shall continue to refer to the parties as they were cited in the original judgement.

Condonation

[2] The application for leave to appeal was filed late on 2 June 2017, the respondents having only obtained a copy of the judgement on 19 April 2017. No explanation is provided why they were unaware it had been handed down earlier. The applicants filed a notice of intention to oppose the condonation application but never filed an answering affidavit. The explanation for the delay is a mixture of misconceptions about when the 15 day period for filing the application expired and the delays in communicating between the new and former attorneys of record (Bax Kaplan Russel Inc and Snyman Attorneys respectively), counsel and others in the course of which the time periods in the rules of Court became subordinated to the work commitments of the practitioners involved, which is generally not an acceptable justification for delay. However, the applicants did not dispute the explanation provided and did not advance any reasons why they would be unduly prejudiced by the delay. In the circumstances, I am willing to condone the filing of the application for leave to appeal on the basis that the respondents appeal rests in part on a point of law.

Merits of the application

[3] In my judgement I decided that the dismissals were substantively fair but were procedurally unfair in that “the respondents did not take the necessary and sensible step of contacting the union to try and end the strike other than issuing the ultimatums and pleading with the strikers”.

[4] In essence, the respondents now argue on appeal that I erred in failing to appreciate that item 6 (2) of schedule 8 of the Labour Relations Act, 66 of 1995 –

4.1 does not oblige an employer, amongst other things, to contact the employees trade union, as part of the requirements of procedural fairness;

4.2 imposes an obligation on employees to contact the union as part of their process of deliberating on ultimatums, and

4.3 the object of the obligation on an employer to contact a union has nothing to do with procedural fairness but is simply an obligation the employer has towards the union that has its own interest in intervening in strike because of the potential negative impact the possible dismissals may have on the union.

[5] Secondly, the respondent's claim that the court erred in finding the dismissals were procedurally unfair, or alternatively in awarding the employees six months' compensation on account of its failure to attempt to contact the employee's union before issuing the final ultimatum. This second ground of appeal essentially concerns whether the court ought to have found the dismissals were procedurally unfair in the absence of communication with the employees union before issuing the final ultimatum given that the employees were aware of the possible consequences of their conduct, that they failed to contact their union themselves, and that on the probabilities it would have made 'no difference' if the union had tried to intervene.

Evaluation

[6] Item 6 (2) of schedule 8 of the LRA states:

> "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."

[7] While it may be a factor in weighing up the striking employees' responsibility for their dismissal and in determining relief, to suggest that item 6 (2), places an equivalent responsibility on them to contact their trade union, as the express wording of the emphasised portion of the provision places on the employer cannot be reconciled with a plain reading of the text thereof. I should also mention that this novel interpretation was never pleaded nor argued by the respondents, who like the applicants could not be bothered to submit written argument when the matter was set down for argument. In my view, it is disingenuous of the respondents to now go to great lengths to raise this point only on appeal and there is little prospect of another court agreeing with their interpretation of item 6(2) in any event.

[8] In relation to finding that the failure to notify the union of the strike affected the procedural fairness of the dismissal, I am also satisfied it is unlikely that another court would not regard such a failure as a very material factor in determining the fairness of the dismissal. The contention that the obligation on the employer to contact the union is purely to protect the union's interests is, with respect, absurd. Once again, this is a novel proposition never canvassed or advanced at the hearing or in argument.

[9] I am well aware that new points of law may be raised on appeal, but feel compelled to point out that these were never raised and in my view have purely been raised to ensure that the Labour Court cannot refuse to grant this application.

[10] Concerning the complaint that the award of six months remuneration was too generous in the circumstances, since I consider I have no choice but to allow the appeal on the point in law, there is no reason to deny the applicants an opportunity to attempt to persuade the Labour Appeal Court that an award of six months' wages of a dozen construction workers was too generous and went beyond what was necessary to emphasise the importance of attempting to contact the union of employees engaged in an unprotected strike.

Order

1. Leave to appeal against the judgment in this matter handed down on 4 April 2017 is granted.
2. Costs shall be costs in the appeal.

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Lagrange J

Judge of the Labour Court of South Africa

(In chambers)