SEENA | LABOUR

CORPORATE NEWSLETTER

Volume 4 – November 2016

IN THIS EDITION

VOORWOORD

Ons is aan die einde van 2016, met die feestyd op hande. Mag elkeen van u die voorreg hê om die tyd met vriende en familie deur te bring en 'n welverdiende blaaskans te geniet.

We at Seena wish you and your family a merry Christmas and a prosperous 2017. Thank you for your support during 2016 and we look forward to being of service in the new year.

Yours Truly

JJ Barkhuizen
MANAGING DIRECTOR

FESTIVE SEASON OFFICE HOURS AND CONTACT PARTICULARS

Kindly take note of the following amended office hours, and days of closure of offices, that shall be applicable during the festive season. Clients should take note that no appointments will be booked in the week of the 26th to the 30th of December, unless it relates to a strike or similar pressing need.

Although our smaller offices will be closed between Christmas and New Year, our offices in Swakopmund and Windhoek will continue to operate on skeleton staff during this time. You will find all contact particulars in the table below. Please do not hesitate to contact us!

OFFICE	DATE OF CLOSURE	DATE OF RE-OPENING	CONTACT NUMBER
Swakopmund	26 December and 2 January	N/A	064 416 100
Windhoek	26 December and 2 January	N/A	061 309 260
Otjiwarongo	23 December	3 January	061 309 260 (Windhoek) or 064 416 100 (Swakopmund)
Keetmanshoop	23 December	3 January	061 309 260 (Windhoek) or 064 416 100 (Swakopmund)
Tsumeb	23 December	3 January	061 309 260 (Windhoek) or 064 416 100 (Swakopmund)

AN ILLEGAL STRIKE IS WRONG, NOT FOLLOWING PROCEDURES ARE WORSE

(National Union of Metalworkers of South Africa (Numsa) and Others v CBI Electric African Cables (JA 51/11) [2013] ZALAC 25; [2014] 1 BLLR 31 (LAC); (2014) 35 ILJ 642 (LAC) (11 October 2013))

In the case of Numsa v CBI which concerns illegal strike dismissals, the South African *Labour Appeal Court showed no mercy to an employer who did not follow the right procedures when dealing with and dismissing illegal strikers. While the strikers acted deliberately, calculated, undermining and unjustly, the employer also made slight errors. The Court found that the dismissal of employees for embarking on an unprotected strike, after issuing an ultimatum without first consulting their union, and failing to conduct a pre dismissal hearing, was procedurally unfair. The South African Labour Court showed some mercy and gave the employer a slap on the wrist. The Labour Appeal Court was not so lenient and came down on him like a ton of bricks. The Labour Court awarded only two weeks wages as compensation to the dismissed strikers. The Labour Appeal Court gave them each* ***12 months.***

The illegality of the strike is not "a magic wand which when raised renders the dismissal of strikers fair"

The facts

After receiving incorrect pay slips, but despite of being aware that the error had already been corrected, workers engaged in an unprotected strike were substantively fairly dismissed because the error did not constitute sufficient provocation to justify the strike. It was however procedurally unfair because the employer did not consult the union before issuing ultimatums.

This case has a history as far back as 2007. It was not the first time that the employees went on strike.

The employees worked for the employer at its plant in Vereeniging/Vanderbijlpark. At the time of their dismissal, on 26 June 2007 some of them had been in the employer's employ for almost forty (40) years.

In May 2007, following a process of protracted negotiations, the employer and the Union agreed to introduce a continuous operation at the employer's plant. It would seem that the new shift system was unpopular with the employees. They threatened to embark on an unprotected strike and this threat forced the employer to approach the Labour Court on 24 May 2007 for an interdict preventing them from doing so.

Despite the interdict having been granted, some of the employees carried out their threat and embarked on unprotected strike action. The employer dismissed those employees. The Union got involved and negotiated with the employer for the reinstatement of the dismissed workers. The employer agreed to reinstate the dismissed employees subject to their being given final written warnings and with an undertaking from each that they would work the new shift system without further interruption or unprotected strike action.

On Monday, 25 June 2007, the first pay day after the introduction of the new shift system, payslips were issued a day later than the norm. The normal practice was that the employees received their payslips at least a day before the actual payday. Not only were the pay slips late but it was also wrong – it failed to accurately reflect time worked, and reflected unexplained deductions for short time. The result was that the employees were paid less than they should have been. The employer was aware of the problem and in an attempt to correct the situation it made additional payments either directly into the bank accounts of the affected employees or to the employees themselves at a later stage.

The employer's failure to pay them correctly, coupled with the manner in which the employer attempted to resolve the situation, angered the employees. As a result the day shift, scheduled to end at 6pm on 25 June, was disrupted when a number of employees left their workstations between 12pm and 1pm, before the end of the shift.

The night shift commenced their shift at 6pm but abandoned their workstations at 10pm and left the premises. Their shift was supposed to run from 6pm to 12am. The reason advanced by the employees for prematurely leaving their shift was that they were not prepared to work for an employer who "*was not paying*" them. Those on the night shift, who were all on final warnings, were dismissed.

The employees appealed against the employer's decision to dismiss them contending that they had not been afforded an opportunity to be heard before they were dismissed. None of the individual employees advanced payslip irregularity as a reason for participating in an illegal strike action. The appeal was dismissed, four employees were found not to have participated in the industrial action and their dismissals were set aside.

In justifying the fairness of the dismissals, the employer contended that the employees received instructions (ultimatums) not to strike, together with their corrected payslips. The employer was convinced that the employees went on strike because they were still discontent with the continuous shift system.

With regard to the procedure followed by the employer in dismissing the employees, it was conceded that there was no pre-dismissal hearing held, but it was stated that the employer's disciplinary code did

not provide for it in the context of an illegal industrial action but conducted an appeal hearing afterwards. They, before dismissing the employees prepared an ultimatum on 25 June at about 6pm and telephoned the union official who was handling the matter but could not get hold of him. Hence they decided to fax the ultimatum to the Union's offices.

The Labour Court (RSA)

The Labour Court found the dismissals substantively fair, but procedurally unfair, only because the employer had failed to consult the union before issuing the ultimatums. This rendered the dismissals procedurally unfair on a limited basis. The court found that the obligation to provide an opportunity to be heard after the expiry of the ultimatum was discharged when the employer's representatives met with the Union officials on 26 June 2007 before the employer took the decision to dismiss the employees. Each employee was awarded compensation equal to two weeks' wages.

The union appealed against this decision. They contended that the Labour Court had erred by finding that the dismissals were substantively fair. Firstly because their conduct did not justify dismissal and secondly, their dismissals were substantively unfair in that the employer had inconsistently applied discipline by dismissing them but not dismissing the day shift employees who had also abandoned their workstations on 25 June 2007 because they had also been short paid. The Union also contended that the Labour Court erred in finding that the dismissals were procedurally unfair on a limited basis. They had not been afforded an opportunity to make meaningful representations.

Labour Appeal Court (RSA)

Substantive Fairness – appropriate sanction

The Labour Appeal Court confirmed the finding of the Labour Court that the dismissals were substantively fair, but overruled it's finding that the dismissals were procedurally unfair on a limited basis.

The Court noted that the LRA permits employers to dismiss employees who participate in strikes which do not comply with its provisions, taking into account such considerations as the seriousness of the contravention, attempts made to comply with the Act, and whether the strike was in response to unjustified conduct by the employer.

Section 68(5) of the Labour Relations Act 66 of 1995 ("the Act") is a statutory provision affording a right to the employer to dismiss employees who participate in a strike that fails to comply with the provisions of the Act. (These provisions are similar to that of section 74 and 75 of our own Labour Act). In determining the fairness of the dismissal effected as a consequence of the employees' participation in an unprotected strike, the Act enjoins the judge who is called upon to determine the fairness of the dismissal to have regard to the Code of Good Practice: Dismissal in Schedule 8 ("the Code").

It is clear from the provisions of section 68(5) that participation in a strike that does not comply with the provisions of Chapter IV (strikes and lock-outs) constitutes misconduct and that a judge who is called upon to determine the fairness of the dismissal effected on the ground of employees' participation in an illegal strike should consider not only item 6 of the Code but also item 7.

Item 6 basically states the following;

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.

Item 7 determines that any person who is determining whether dismissal for misconduct is unfair should consider:

Whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and

If a rule or standard was contravened, whether or not:

(i) the rule was a valid or reasonable rule or standard;

(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;

(iii) the rule or standard has been consistently applied by the employer; and

(iv) dismissal was an appropriate sanction for the contravention of the rule or standard."

In the Court's view the determination of substantive fairness of the strike-related dismissal must take place in two stages, first under item 6 when the strike related enquiry takes place and secondly, under item 7 when the nature of the rule which an employee is alleged to have contravened, is considered. 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.

It follows that a strike-related dismissal which passes muster under item 6 may nevertheless fail to pass substantive fairness requirements under item 7. This is so because the illegality of the strike is not "*a magic wand which when raised renders the dismissal of strikers fair*" The employer still bears the *onus* to prove that the dismissal is fair.

Factors that should be taken into account in evaluating the fairness of a strike dismissal, should also include the duration of the strike, the harm caused by the strike, the legitimacy of the strikers' demands, the timing of the strike, the conduct of the strikers and the parity principle. This be so, as the consideration of the further factors ensures that the enquiry which is conducted, to determine the fairness of the strike-related dismissal, is much broader and is not confined to the consideration of factors set out in item 6 of the Code.

The Labour Appeal Court held that the pay slip error was insufficient to justify the strike, because the strikers knew when the strike commenced that the error had already been corrected. Other less disruptive means could have been used to address their concerns. The strikers also ignored a clear ultimatum, and they made no attempt to comply with the provisions of the LRA. While the workers on the day shift had not been dismissed for walking off the job, none were on final warnings for participating in unprotected strike action. The dismissal was, accordingly, substantively fair. The court *a quo*'s reasoning for its finding cannot be faulted. The night shift employees' decision to leave their

workstations at 10pm and before the end of their shift constituted a misconduct for which they were liable to be disciplined for. While the Court accepted that the employer's failure to pay the employees correctly for the hours they had worked, triggered the employees' response, it did not, however, agree that the means they utilised justified the end they sought to achieve. Abandoning their work stations and leaving the employer's premises was not conduct, which in all the circumstances of the case, could be said to have been a reasonable means by which to respond to the employer's failure to comply with its contractual obligations. Other less disruptive and non-belligerent ways to resolve the issue were available to the employees.

Their conduct was deliberate and calculated. It undermined the process of collective bargaining as a tool to resolve industrial disputes. When they reported for their shift they were appraised of the nature of the problem regarding short payment of their wages and were told that it was being attended to by the employer's management. They were told to report for their shift and warned that if they failed to do so they faced the risk of dismissal. They were given an ultimatum which they ignored. They decided to walk off at 10pm to show solidarity with the day shift. Their collective decision to walk off at 10pm was taken before they filed any grievance. There was no attempt at all on their part to comply with the provisions of the Act regarding the handling of grievances. The employees' contention that they were justified in leaving their shift early because of the employer's failure to pay them correctly, was rejected.

Substantive fairness – inconsistent disciplinary action

The second ground on which the employees contended that their dismissal was substantively unfair was based on the allegation that the employer had inconsistently applied discipline by dismissing them but not dismissing the day shift employees who had also abandoned their workstations on 25 June 2007 because they had also been short paid.

Fairness generally requires that like cases should be treated alike however, there may exist valid grounds in a particular case to distinguish one employee from another, albeit that they have engaged in the same conduct, on the basis of material factors.

The day shift employees who similarly walked off their workstations on 25 June 2007 were not dismissed. They were each issued with a final written warning valid for 12 months. The Court held that, there existed valid reasons for differentiation. The dayshift employees did not get any ultimatum on 25 June 2007. When the ultimatum came to their attention on 26 June 2007 they heeded it and worked their shift. The dismissed employees in the matter received the ultimatum before the resumption of their shift but ignored it. Their conduct was more reprehensible in that it was deliberate and calculated.

Procedural fairness – procedure prior to issuing of ultimatums

The Code of Good Practice: Dismissal also requires employers to contact the strikers' union to discuss the course of action the employer intends to adopt. Since participation in an unprotected strike constitutes misconduct.

In the Court's view the employer did not follow a proper procedure in issuing the ultimatum. In terms of the Code it was incumbent on the employer to engage with the Union before issuing the ultimatum on 25 June 2007. This, the employer failed to do. Item 6(2) of the Code makes it clear that 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. This is necessary for two reasons. Firstly, it affords the union an

opportunity to persuade the strikers to resume work and secondly, it provides a safeguard against possible rash action by the employer. In the event that the employer decides to issue an ultimatum, which should meet the requirements of the Code, the employer must ensure that it allows the employees sufficient time to reflect on the ultimatum and to respond thereto. In the present matter it is not the employer's case that its failure to comply with these prescripts should be excused because it could not reasonably be expected to comply with these requirements.

Procedural fairness – pre dismissal hearing

Contrary to the Labour Court's finding, The Appeal Court was not satisfied that the employer complied with its obligation to provide the employees with an opportunity to be heard before effecting the dismissals after the expiry of the ultimatum. Prior to the pre-dismissal meeting held on 26 June 2007, it is apparent that the employer had already taken a decision that the employees who took part in "*illegal industrial action*" would be dismissed and that the day shift employees who walked off at between 12pm and 1pm would receive a final written warning. Therefore no amount of persuasion by the Union that the strike had nothing to do with the introduction of the new shift system, but rather with the late and wrong payslips would have convinced the employer to change its preconceived stance". There was a duty on the employer to afford the affected employees an opportunity to be heard before a decision to dismiss them was taken. The employer's failure to do so rendered its decision to dismiss the affected employees procedurally unfair.

In determining the amount of compensation to be awarded, the Court held that it shall be guided by the provisions of section 194(1) of the LRA and item 6 of the Code, and in particular that the strike was of short duration (it was a two hour strike), was in response to the employer's failure to pay the employees their correct wages and the fact that the employer made no attempt to bring the ultimatum to the attention of the Union when it was clear that a union official directly dealing with the matter was not immediately available and could not be contacted. It is the court's view that it is probable that the strike could have been avoided had the employer engaged with a union official before issuing an ultimatum

Taking all of the above factors into account, the Court was of the view that 12 months' compensation would be just and equitable in all the circumstances and ordered the employer to pay.

The lessons we learnt from this decision are the following:

1. The employer's disciplinary code which provides for "illegal strike dismissals" without a pre-dismissal hearing, is of no force or effect;

2. The employer must consult with the trade union prior to issuing of ultimatums if the employees have already embarked on an illegal strike or threatened to strike. If a union is not involved, consult with the employees in order to resolve the grievance or dispute;

3. If the dispute or grievance is not resolved, and the employees persist in their conduct or threat, issue ultimatums which allows the employees sufficient time to reflect on the ultimatum and to respond thereto;

4. If employees do not heed to the ultimatum/s, and proceed to strike, they may be dismissed, only after conducting a proper pre-dismissal hearing and in considering the factors referred to by the Court above, namely:

a. the duration of the strike;
b. the harm caused by the strike;
c. the legitimacy of the strikers' demands;
d. the timing of the strike;
e. the conduct of the strikers; and
f. the parity principle(compare the conduct with the consequences of the strike and the effect dismissals would have on the employees).

"HANDLE WITH CARE – ILLEGAL STRIKERS- THEY CAN BREAK (your bank account)"

Compiled by:
Otto Bronkhorst

NEEEB, LATEST DEVELOPMENTS

We have regularly updated you on all developments related to NEEEB during the course of 2016. According to Me. Yvonne Dausab, Chairperson of the Law Reform and Development Commission (LRDC), the concept bill is currently being revised and will be tabled for public discussion in the near future. What exactly the revised version will entail, is currently uncertain, although changes to the current section 23, which makes the sale of 25% ownership in a private sector enterprise to previously disadvantaged Namibians compulsory, is widely anticipated. We will continue to keep you updated once more information is available.

Contact Us

Windhoek Office
Tel: (061) 309 260
Fax: (061) 309 266
Email: windhoek@seenalegal.com

Swakopmund Office
Tel: (064) 416 100
Fax: (064) 461 000
Email: swakop@seenalegal.com

Keetmanshoop Office
Tel: (063) 225 931
Fax: (063) 225 932
Email: keetmans@seenalegal.com

Tsumeb Office
Tel: (067) 222 900
Fax: (067) 222 500
Email: tsumeb@seenalegal.com

Otjiwarongo Office
Tel: (067) 304 915
Fax: (067) 304 809
Email: otjiwarongo@seenalegal.com