

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Case no: JA76/97

In the matter between:

D W GLANSBEEK

Appellant

and

J D G TRADING (PTY) LTD

Respondent

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JUDGMENT

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[1] On 29 August 1997 a notice of appeal was lodged in this matter. The notice of appeal was defective in content. It was also out of time. The record of the proceedings in the industrial court and the prescribed form was then delivered on 13 October 1997, also out of time. On that day the registrar gave notice to the appellant's attorneys that the appeal had been set down for hearing on 9 February 1998, that appellant's heads of argument had to be served and filed on or before 1 December 1997 and respondent's heads by 15 December 1997. On 24 November 1997 respondent's attorneys wrote to appellant's attorneys informing them that the notice of appeal was late and did not comply with the rules of court. On 9 December 1997 they were similarly informed that appellant's heads of argument had not been filed. On 12 December 1997 the respondent's heads of argument were served and filed. On the same day respondent's attorneys filed and served a notice of motion asking that the appeal be struck off the roll because of the defective notice of appeal. The appellant's heads were eventually served and filed on 18 December 1997. On 22 December 1997 a notice of motion was served and filed by the appellant's attorneys, seeking condonation for the late noting of the appeal, leave to amend the notice of appeal, condonation for the late filing of the record of the proceedings and the prescribed form, reinstatement of the appeal, condonation for the late filing of the heads of argument, and leave to lead further evidence on appeal, said to be relevant to the question of compensation.

[2] Affidavits in support of the various applications give no, or little, explanation for

these remarkable failures to comply with court procedures. An examination reveals the following.

[3] Appellant's excuse for, inter alia, the late noting of appeal is that he knew nothing of the prescribed rules and left everything in the hands of the industrial relations consultant who represented him in the industrial court. Approximately a week after he signed the notice of appeal, he says, the consultant, Mr Daniels, informed him that the appeal was noted late and advised him to consult an attorney. Daniels himself did not make an affidavit to explain why the appeal was noted late. There is no explanation why such affidavit was not forthcoming. One therefore simply does not know the reason for the late noting of the appeal. If the appellant wishes to lay blame on Daniels he must at least make an effort to substantiate his averment to that effect. This has not been done.

[4] There is no explanation for the defective notice of appeal.

[5] The appellant's attorney made an affidavit in which she explained why the record and prescribed form was filed late, viz. that she was wrongly informed that it had to be done in Pretoria, rather than at the registrar of this court in Johannesburg. This explanation may be a reasonable one.

[6] The same cannot be said for her explanation why she did not realise the appellant's heads had to be served and filed by 1 December 1997. She admits that she received the notice of the registrar to that effect timeously, but entered the date on her diary as 15 December 1997. She candidly says that she cannot give a reason for this, except that she must have "misread" the telefax. She only realised her mistake when telephoned by the respondent's attorney on 8 December 1997. She does not say that on becoming aware of this she informed counsel of the fact that the heads were late. Counsel indicated from the bar that he was told, which makes his failure to complete the heads expeditiously even less acceptable.

[7] Counsel's further explanation for not delivering the heads on 15 December 1997 is equally unsatisfactory. He said he planned to work on them between 8 and 13 December 1997, but was precluded from doing so because he accepted a later brief to draw a petition for leave to appeal which had to be delivered by courier to Bloemfontein on 13 December 1997. He says he could not refuse this brief because of his earlier involvement in that matter in the labour appeal court. Apparently he anticipated that one day would be sufficient time to complete the appellant's heads. On 14 December 1997, however, because his computer malfunctioned, he was unable to do so. He had that particular problem seen to on 15 December 1997, but then a difficulty with the tab key of the computer caused further delays. One must assume that these problems persisted for another two days, because he only completed his heads on 18 December 1997. Why he could not take other steps to have the heads typed by his attorney or someone else is not explained at all.

[8] There is no explanation why the various applications were only brought on 22 December 1997 and not earlier.

[9] The conduct of the appellant's attorney and counsel fell short of what I consider to be reasonable standards for their respective professions.

[10] The appellant's explanation for not leading the evidence he now seeks to introduce is to once again blame the unfortunate Daniels. He goes so far as to state that it is in the public's interest that "this court should rally to rescue lay litigants who entrust their matters to industrial relations consultants who, by oversight, fail to present evidence on trial". Daniels may, or may not, be to blame for not leading the evidence, but on the papers in the application no proper basis is laid for an acceptance that he is, in fact, to blame. The appellant says so, but Daniels does not confirm it. That difficulty may have been overcome if efforts were made to obtain an affidavit from him, but that he refused. As stated earlier there is no evidence of this at all. In any event, before appellant makes possibly unfounded allegations about Mr Daniels, it behoves him to explain why he chose Mr Daniels as his representative and why he should not accept responsibility for doing so. On that issue he remained silent.

[11] It is trite law that a requirement for any condonation for non-compliance of the rules is an explanation for that non-compliance. I do not consider that there is any explanation for the non-compliance in respect of the late noting of an appeal and the defective notice of appeal itself. I would therefore dismiss the application for condonation of the late noting of the appeal, the application for leave to amend the notice of appeal and the application for the reinstatement of the appeal for this reason alone. In that event there is no appeal before us and the necessity for dealing in detail with the other applications falls away. In consequence they should also be dismissed.

[12] This finding makes it strictly unnecessary to deal with the merits of the case. I am far from convinced, however, that the appeal, if allowed to proceed, would be successful.

[13] The appellant was dismissed by the respondent on 4 August 1995. That appellant's post as a regional manager had become redundant for proper commercial reasons and that he was aware of the possibility of retrenchment since May 1995 is not in dispute. The appellant's complaint was that he should not have been compulsorily retrenched, but that he should have been afforded an opportunity of choosing between a voluntary retrenchment package or a temporary lay-off scheme, similar to the choice offered to non-managerial employees whose posts also became redundant. The respondent countered that he was given such a choice, had sufficient time to make an election, but that he vacillated, and refused to make a decision. His failure to exercise his choice eventually made a decision of compulsory retrenchment inevitable. The industrial court decided the matter in respondent's favour.

[14] The scheme agreed to between the respondent and the union representing non-managerial employees was to the effect that in the event of restructuring there would be no compulsory retrenchment. Employees would, in such an event, have a choice of either accepting a voluntary retrenchment package or be temporarily laid-off in terms of a scheme where they would receive reduced remuneration for a year and be re-employed if employment opportunities arose within that year. In this particular instance they had to exercise the option of voluntary retrenchment in writing by 15 June 1995. Failure to do so resulted in automatic temporary lay-off in terms of the scheme agreed to.

[15] The appellant was not a union member, but the respondent's officials testified that they used the agreement as a guideline in their dealings with managerial employees as well. After being told of the restructuring in May 1995 the appellant assisted in this exercise at the respondent's Randfontein premises and on 16 June 1995 (a day after the deadline) he had consultations with the human resources manager of the respondent, Mr McCulloch, to try and sort out his own situation. This became necessary because he had been unable to do so with his superior, Mr. Mackay. These consultations failed because neither McCulloch nor Mackay could give the appellant a final answer on the issue relating to the shares he purchased in the company in terms of an agreement between himself and the JD Group Limited Share Incentive Trust ("the trust"). The appellant considered finality on the share issue as crucial to an informed decision on his part on the choices available to him. After 15 June 1995 it was unreasonable to assume that automatic lay-off was still a possibility - it was now a straightforward choice between retrenchment and lay-off.

[16] It is not necessary, for the purposes of this judgment, to set out in any detail the provisions of the agreement with the trust with regard to the purchase of the shares in the company by the appellant. Suffice it to say that it would have been to the substantial benefit of the appellant if he had been able to pay the full purchase price of the total amount of shares which he was entitled to buy prior to the termination of his employment or prior to December 1996.

[17] I will also accept, without deciding the issue, that finality on the issue whether and to what extent he would be allocated the shares on retrenchment was necessary in order that he could make an informed election on the choices confronting him. In my view, however, finality on this issue was reached soon after the meeting with McCulloch on 16 June 1995.

[18] McCulloch told appellant that he had no mandate to deal with the share issue. He advised appellant to see other company officials in this regard. Appellant did so and spoke to a Mr Mel Jaye about the shares. Jaye apparently indicated that the trustees would allocate the appellant his full complement of shares on payment of the outstanding purchase price of R17 000. On 23 June 1995, however, Jaye wrote a letter to the appellant in the following terms:

"This serves to confirm that the trustees of the above mentioned trust have determined that fully paid ordinary shares in JD Group Limited in settlement of the amount paid in by you in reduction of your loan account in the books of the trust, shall be transferred from the Trust to your own name.

Accordingly, we enclose herewith share certificate number 18274 for 4200 ordinary shares in JD Group Limited registered in your name."

Appellant admitted in evidence that he had received this letter on 23 June 1995. On the face of it, therefore, the appellant's request for finality on the share issue had been met by the respondent, insofar as it was able to do so, by 23 June 1995. Nothing further prevented him from exercising the choice he says he was entitled to.

[19] Three reasons may be advanced why this letter did not dispose of the objection raised by the appellant about the shares. The first is that a copy of the resolution of the trustees to make the necessary allocation was not enclosed in the letter. The second is that the trustee's decision was based on the fact that appellant's employment with the respondent had been terminated by 23 June 1995, which, in fact, was not the case. The third is that the appellant handed a cheque of R17 000 to Jaye on 27 June 1995 in payment of the outstanding purchase price for the remaining shares and that he was thus entitled to his full complement of shares.

[20] It was not necessary for the respondent to attach a copy of the trustees' resolution to Jaye's letter. The appellant could have dealt directly with the trustees and, strictly speaking, this is the course he should have followed.

[21] If the trustees' decision was based on a misconception of the true facts relating to the termination of his employment, the appellant's remedy lay against them and the trust, not the respondent. The respondent was requested to obtain a final decision from the trustees on the share issue, but the decision was that of the trustees, not the respondent. In any event, the trustees' decision clearly indicated to the appellant what would happen if he opted for retrenchment and not for the temporary lay-off. This was the information he sought to make an informed decision. He nevertheless still refused to make a decision.

[22] The fact that appellant handed a cheque to Jaye on 27 June 1995 did not change matters. The cheque was never deposited. By 27 June 1995 the trustees had already made their decision. Jaye could not change the decision, nor could the respondent itself. Only the trustees could, and there is no evidence that the appellant at any stage asked them to do so, nor is there any evidence that appellant requested the respondent's officials to make representations to the trustees to change their decision.

[23] It follows that by 23 June 1995 the appellant knew what his position was in regard to the shares. If he was dissatisfied with the decision it was open to him to challenge the trustees' decision on legal grounds, or make representations to them in order to convince them to change their minds, or ask respondent's officials to do so on his behalf. He did nothing of the sort. He did not tell the respondent that he needed further time to make his election because he wanted to take the matter up again with the trustees. Instead, he sat tight, refusing to make a choice. It is true that it might have been better for the respondent to have given the appellant a further ultimatum to make his final choice, but this factor should be weighed up against the unreasonable delay by the appellant, his failure to request further time to consider his options, and the fact that by delaying his choice he was, in effect, forcing the respondent to pay him a salary while still employed, in addition to his eventual retrenchment package.

[24] Under those circumstances it was not unreasonable that the respondent decided to make up its own mind. Despite appellant's evidence to the contrary, I am not convinced at all that he would have accepted an alternative position at the J D Export plant if that had been offered to him. His evidence is that he required a properly mandated offer to be made to him. Mackay's evidence was that he was told that Van Tonder, who made the offer, had the necessary authority. The matter was not taken further. It seems that the most likely reason

for this was that appellant considered the position as too onerous and tenuous in nature.

[25] The commercial rationale for retrenchment was thus established. The dismissal on 4 August was not unfair, nor was the retrenchment package unreasonable. The appeal would have been unsuccessful.

[26] Mr Heyns, who appeared for the respondent, did not file heads of argument on the merits of the dismissal, because he considered the notice of appeal to be null and void. When the matter was called he indicated that in the event of condonation and leave to amend the notice of appeal being granted, he would seek a postponement in order to deal with the merits. That approach was not well considered. There were several applications for condonation of procedural lapses by the appellant. The merits of the dismissal were relevant to these applications in the sense that had a reasonable explanation been given for the lapses, the prospects of success on appeal could have become decisive. A deliberate decision not to deal with the prospects of success would not have been sufficient reason to grant a postponement. The conclusion I have come to, however, saves Mr. Heyns any embarrassment in this regard.

[27] In the result the various applications, set out in appellant's notice of application, bearing this court's date stamp of 22 December 1997, are dismissed with costs.

J C FRONEMAN DJP.

I agree

J F MYBURGH JP

I agree

F KROON JA

Date of hearing: 9 February 1998

Date of judgment: 13 February 1998

Appellant's attorneys: Langstaffe Bird & Company

For the appellant: Mr Wilke

For the respondent: Mr A G Heyns

Respondent's Attorneys: Snyman Van Der Heever Heyns Inc

This judgment is available on the Internet at Website: <http://www.law.wits.ac.za/labour crt>.