

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
Held in Cape Town

Case No : CA8/99

In the matter between:

ABSA BANK LIMITED

1st Appellant

CORTAL DIRECT (Pty) LIMITED
Appellant

2nd

And

B. H. G. MACKAY

Respondent

JUDGEMENT

ZONDO JP

Introduction

[1] This is an appeal against a judgment of the Labour Court, per Mlambo J, handed down in a dispute between the appellants and the respondent about the fairness or otherwise of the dismissal of the respondent by the appellants. The facts of this matter which are relevant to this appeal are set out below.

THE FACTS

[2] The first appellant is ABSA Bank Limited. The second

appellant is Cortal Direct (Pty)Limited, a subsidiary of the first appellant. The respondent was initially employed by the first appellant on the 1st November 1994. He was based in Cape Town. In 1995 the respondent was promised a more senior position in Johannesburg which would have given him a salary increase of at least R3000,00 per month. He was promised this by the then managing director of the first appellant, one Mr Ben Solomon. Mr Solomon told the respondent in April of 1995 that he could proceed to sell his house in Cape Town in preparation for his relocation from Cape Town to Johannesburg. It was agreed between the respondent and Mr Solomon that the former would relocate in July 1995. Mr Solomon relinquished his position as managing director of the first appellant in May 1995 and moved to another position within the ABSA group. Mr Solomon informed the respondent that Mr Pope would finalize all outstanding arrangements with regard to his relocation to Johannesburg. However, Mr Pope subsequently informed the respondent that the latter was no longer going to move to Johannesburg.

[3] At some stage either in 1996 or 1997 the respondent was awarded five merit points for his work performance which was a very good rating and was nominated for the ABSA Management Awards for being the best of all the first respondent's unit trust consultants countrywide. On the 30th September 1997 the respondent was appointed as Manager: Sales (Western Cape) of the second appellant. He commenced his duties on the 1st October 1997. The respondent's appointment to this position followed upon an offer which Mr Solomon had made to the respondent after he had learnt that the respondent had been offered a job by Metlife. As a result of Mr Solomon's offer, the respondent turned down Metlife's offer.

[4] At the end of March 1998 the respondent received a fax from Mr Swart, the successor to Mr Solomon, to the effect that he had been awarded a salary increase of 2,5% and three merit points. The respondent was unhappy with this. His unhappiness was due to the fact that this was below what had been recommended for him, namely, five merit points. The respondent asked Mr Swart to have this reconsidered but Mr Swart said it could not be reconsidered.

[5] The respondent subsequently instituted a grievance in terms of the appellants' grievance procedure about the matter of the merit points as well as the salary increase awarded to him. His complaints were:

- (a) the unilateral award to him of three merit points.
- (b) that the salary increase for job bands M and P (the respondent fell within the M band) should be more than 90% and yet he was awarded an increase of only 2,5%.
- (c) that he had not been given sufficient resources to fulfil his task efficiently.

[6] At a meeting held on the 2nd April 1998 in Johannesburg to deal with the respondent's grievance, Mr Solomon lost his temper with the respondent when the respondent asked him to revert to him by 17h00 the following Tuesday, the 7th April. According to the respondent Mr Solomon said: **"If you put a gun to my head to get back to you by 17h00, I will keep**

a gun to your head and close the Belville office at the end of the month if it is not profitable". In their response to the respondent's statement of claim the appellants admitted that Mr Solomon did say that the respondent should not put a gun to his head to get back to him by 17h00 on the 7th April. Not much came out of the grievance meeting of the 2nd April. Accordingly the respondent was unhappy and he processed his grievance to the next stage which was phase 4. Later on, with the respondent's consent, the grievance was moved to phase 5. A grievance meeting was subsequently held on the 16th April 1998. The meeting was chaired by a Mr Grobbelaar. A Koos van der Merwe, who was an industrial relations consultant, acted as a facilitator. The respondent appeared in person. However, there were two officials from his union, SASBO, who attended the meeting as observers.

[7] On the 17th April 1998 Mr Grobbelaar faxed to the respondent a copy of his recommendations which he had faxed to Mr Griessel, the head of the Human Resources Department. In his report the chairperson was critical of the appellants' management. He found the respondent's complaint about his salary justified. He found the appellants' failure to give the respondent logistical support unjustified. He also found that there was no justification for the management's having adopted an **"intransigent and threatening attitude"** towards the respondent. He was of the opinion that it was impossible in the circumstances for the Western Cape office of the appellants to break even - let alone to make profit, within the short time of its

existence. He made two recommendations. The one was that the respondent's salary should be increased with effect from the 1st April 1998. The other was that the respondent should be placed in an alternative position within his field of experience. He said such position should preferably fall geographically within the metropolitan area of the Western Cape. The respondent's terms and conditions of appointment were to be maintained on post M or P. The chairperson also recommended that the respondent should be given two alternative positions to choose from.

[8] On the 20th April 1998 the respondent was informed of the decision taken by Griessel in the light of the recommendations of the chairperson of the grievance proceedings. Mr Griessel's decision was that the respondent be given a salary increase of 9.73% retrospective to the 1st April 1998 and that the respondent and the first appellant would identify another suitable position within the Western Cape area for the respondent; in this regard the respondent was required to contact the Group General Manager, ABSA Human Resources, Ms Laetitia van Dyk. Mr Griessel's decision was also to the effect that, if the efforts to find a suitable position for the respondent were unsuccessful within three months, consideration would be given to the termination of the respondent's services in terms of the first appellant's retrenchment policy. Subsequently the respondent sent his curriculum vitae to a number of officials within the first appellant and attended a number of employment interviews. Included among those officials of the first appellant to whom the respondent sent his curriculum vitae were Laetitia van Dyk, Hennie Geldenhuys, and Marie Hamman, Marketing Manager of ABSA Investment Management Services (AIMS).

[9] On the 22nd June 1998 the respondent had an interview with Ms Hamman. That was for the vacancy of a consultant. Ms Hamman informed the respondent that the latter's

remuneration package was too high for that post and that people could be appointed from outside the first appellant for a lower package. The respondent was also told by Hamman that, despite the fact that a vacancy had been advertised for a regional sales manager for ABSA Investment Management Services, no appointment would be made to that vacancy. The following day Hamman telephoned the respondent and informed him that there was no position available for him within ABSA Investment Management Services.

[10]On the 23rd June 1998 the respondent sent his curriculum vitae to Mr Johan Swanepoel of the ABSA Trust for the position of an offshore consultant. The following day he received a reply to the effect that his application had been unsuccessful. On the 6th July 1998 the respondent was informed by Ms Elaine van der Toorn, employed as a Human Resources consultant by the first appellant, that she was calculating his retrenchment package. The respondent replied that that was premature as the first appellant was required to place him in an alternative position. She said she was going on leave on the 15th July and wanted to finalize the process before then.

[11]On the 15th July 1998 the respondent received a letter of the termination of his services from Ms van der Toorn. The letter was signed by Letitia van Dyk on behalf of Mr Griessel. The letter bore the date of the 20th July 1998 but was already faxed through to him on the 15th July. On the 16th July the respondent sent a letter to a number of officials of the first appellant advising them that he would be referring the matter of his dismissal to the Commission for Conciliation, Mediation and Arbitration ("**CCMA**") as a dispute. That was done. The

dispute could not be resolved and it was then referred to the Labour Court for adjudication.

Adjudication of the matter in the Labour Court

[12] When the dispute about the fairness or otherwise of the dismissal of the respondent came before the Labour Court, the respondent's case was presented at two levels. The first was that the respondent's dismissal was automatically unfair in that the reason for which the respondent was dismissed was that he had instituted a grievance against the appellants which, so the argument went, had upset them. It was argued that a dismissal for such a reason was an automatically unfair dismissal as contemplated in sec 187(1)(d) of the Act. The second was that, even if the dismissal did not constitute an automatically unfair dismissal, it, nevertheless, remained an unfair dismissal both procedurally and substantively. The difference in legal effect between a dismissal that is automatically unfair and one that is ordinarily unfair is that the maximum payment for compensation for an automatically unfair dismissal is 24 months' remuneration whereas, for an ordinarily unfair dismissal, it is 12 months remuneration. The court a quo gave its judgment in favour of the respondent. It concluded that the respondent's dismissal was automatically unfair. As the respondent was not seeking reinstatement but was seeking only compensation, the court a quo awarded him compensation equal to 24 months' remuneration plus costs.

The appeal

[13] Although initially the appeal was against the whole judgment of the Labour Court, this changed with the delivery of the appellants' heads of argument. In their heads of argument, the appellants conceded that the dismissal of the

respondent was procedurally unfair in that they had not consulted with the respondent in terms of sec 189 of the Labour Relations Act, 1995 (Act No 66 of 1995) ("**the Act**") before they could dismiss him. However, the appellants persisted in their contention that the court a quo erred in finding that the reason for the dismissal of the respondent was that he had lodged a grievance against the appellants and, that, for that reason, his dismissal was automatically unfair. This was the finding that formed the basis of the court a quo's order of compensation equal to 24 months' remuneration. Accordingly, when the appeal was heard, the appellants' appeal was limited to seeking the reversal of the declaration that the dismissal was automatically unfair - as opposed to a declaration that it was unfair and an order reducing the amount of compensation from 24 months remuneration to 12 months remuneration . The appellants also sought an order of costs on appeal.

[14] In the light of the above the first question we have to decide is whether the finding of the court a quo that the reason for the respondent's dismissal was that he had lodged a grievance against the appellants is correct. If we find that the court a quo erred in making this finding, we will have to reduce the compensation awarded by the Labour Court from 24 months' remuneration to 12 months' remuneration. If, however, we find that the court a quo was correct in making that finding, then the next question that we must decide is whether that renders the dismissal automatically unfair as contemplated by sec 187(1)(d) of the Act.

[15] There are two questions which must be dealt with if we are to uphold the finding that the respondent's dismissal was

automatically unfair. The one is factual, the other legal. The factual one is whether the reason why the respondent was dismissed is that he had instituted a grievance against the appellants. The legal one is whether, when an employee uses an internal grievance procedure of his employer, he can be said to be **"exercising a right conferred"** on him by the Act as contemplated by sec 187(1)(d)(i) of the Act. However, if the answer to the factual question is in the negative, the legal question will fall away.

**WAS THE RESPONDENT DISMISSED BECAUSE HE
INSTITUTED A GRIEVANCE AGAINST THE APPELLANTS?**

[16]I think it must be borne in mind that the respondent's departure from the appellants' employment followed upon his position with the second appellant being redundant as well as the first appellant's failure to appoint him to anyone of a number of vacancies which were available at the time. In the light of this it seems to me that, if we are to uphold the respondent's contention that he was dismissed because he lodged a grievance against the appellants, we would have to find that the closing down of the project of the second appellant that the respondent was in charge of was not genuine but was resorted to in order to victimise the respondent for instituting an internal grievance against the appellants. I do not think that there is sufficient evidence before us to support such a finding. In any event it was never put to the appellants' witnesses during their cross examination as part of the respondent's case that the reason why the

project was closed down was not because there was a genuine reason for its failure but because there was a stratagem to get rid of the respondent. Mr Steenkamp conceded that this was never put to the appellants' witnesses. If it had been put, the appellant would have had an opportunity to deal with it. This might have entailed the calling of certain witnesses which were not called or the witnesses who were called could have had a chance to deal with it in whatever way they could. It would not be permissible to make a finding based on that submission. In the circumstances I would not be able to make such a finding.

[17] Even if the closing down of the second appellant's project was a stratagem to get rid of the respondent, the closing down of the project would not have been sufficient by itself to justify a finding that the respondent lost his employment because he instituted a grievance against the appellants. I say this because, even if the project was closed down as a stratagem to dismiss the respondent, such stratagem would have failed if the respondent had been appointed to one of the vacancies for which he was considered by various officials of the first appellant. The position is that the respondent had an opportunity of being appointed to anyone of the vacancies that he was considered for.

[18] In order to sustain the submission that the respondent was dismissed because he instituted an internal grievance against the appellants, it would be necessary to find that the reason why the various officials of the first appellant who had occasion to consider him for positions decided not to appoint him to anyone of those vacancies was not that they genuinely believed he was not the right candidate to appoint or that they genuinely believed he was not suitable for such positions or that there were other more suitable or more qualified candidates for such positions, but, that it was because they were part of a conspiracy to get rid of him. This is no sufficient evidence before us to sustain such a finding. There is not even evidence

that all those officials were aware that the respondent had instituted a grievance against the appellants. On the contrary there is evidence suggesting lack of knowledge of the respondent's grievance on the part of some of the officials of the first appellant who had occasion to consider the respondent for some vacancy or another. In any event it was also never put to the appellants' witnesses that they had been part of such conspiracy and that that is why they did not appoint the respondent. In those circumstances it would not be permissible for us to base our judgement on the existence of such a conspiracy.

[19] Once we are unable to make a finding of conspiracy by officials of the appellants against the respondent, the position is that, even after the closure of the second appellant's operation, the respondent still had a chance to keep his employment or get employment, with the first appellant. Although the respondent probably should have been appointed to the position for which he was interviewed by Hamman, we cannot say that the reason why he was not appointed was that he had lodged a grievance against the appellants. In the light of the conclusion we have reached on the respondent's reason for dismissal, it follows that the court a quo's finding that the respondent's dismissal was automatically unfair cannot be upheld. The same is also true of the award of compensation equal to 24 months' remuneration.

[20] It appears to us that the concession by the appellants that the respondent's dismissal was procedurally unfair was properly made. The compensation equal to 12 months' remuneration is therefore justified. With regard to costs, the position is that, although the appeal was noted against the whole judgment of the court a quo, the appeal was later confined to only part of the judgement. In respect of that part of the judgment, the appellants have achieved success. The respondent opposed the appeal throughout even after the appeal was limited. I think the result of the appeal as well as the decision of the appellants to abandon their appeal against the procedural fairness of the dismissal means that in effect each party has achieved partial success on appeal. In the light of this I think an appropriate order with regard to costs on appeal would be to make no order as to costs. I can see no reason to interfere with the costs order made by the court a quo.

[21] In the premises the order I make is the following:-

1. The appeal succeeds in part and fails in part.
2. The order of the court a quo is hereby set aside and replaced with the following order:-

“(a) The dismissal of the applicant was procedurally unfair.

(b) The respondents are ordered to pay to the applicant compensation equal to 12 months’ remuneration calculated at the applicant’s rate of pay at the time of his dismissal jointly and severally the one paying the other to be absolved.

(c) The respondents are ordered to pay the applicant’s costs jointly and severally the one paying the other to be absolved.”

3. There is to be no order as to the costs of the appeal.

R. M. M. ZONDO
JUDGE PRESIDENT

I concur

C. R. NICHOLSON
JUDGE OF APPEAL

I concur

R. NUGENT
ACTING JUDGE OF APPEAL

Appearances:

For the appellant: Adv P. Pretorius SC
Instructed by : Edward Nathan & Friedland Inc

For the Respondent: Mr A. Steenkamp
Instructed by: Cheadle Thompson & Haysom

Date of hearing: 14th June 2000

Date of judgement: 22 August 2000