

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: JA 63/99

In the matter between:

C P J DU TOIT

First Appellant

R G HERBST

Second Appellant

and

MPUMALANGA DEVELOPMENT CORPORATION

Respondent

JUDGMENT

MOGOENG JA

INTRODUCTION

[1] This is an appeal against a determination made by the Industrial Court in terms of section 46(9) of the Labour Relations Act No. 28 of 1956. The determination made was to the effect that the Appellants' dismissal constituted an unfair labour practice on the basis that it was procedurally unfair. Apart from making a declaratory order that the dismissal constituted an unfair labour practice, the Industrial Court declined to make an order of reinstatement or compensation. No order as to costs was made. The Appellants appeal against the Industrial Court's refusal to order reinstatement or compensation and costs in their favour. There is no cross appeal against the declaratory order of the Industrial Court that the dismissal constituted an unfair labour practice. The issues before us are whether:

(a) the Industrial Court should have found that the Appellants' dismissal was substantively unfair;

(b) the Appellants should have been reinstated or awarded compensation over and above the severance packages they were paid;

(c) an order for costs should have been made in the Appellants' favour.

I will now briefly set out the background to this case.

BACKGROUND

[2] The first Appellant, Mr C.P.J du Toit, was the Chief Executive Officer ("CEO") of the KwaNdebele Development Corporation ("KNDC") for six years. The second Appellant, Mr R.G Herbst, was the CEO of the Kangwane Economic Development Corporation ("KEDC") from 1987 to 1989 and later rejoined it in 1992 until 1996. Mr Keevie, whose dismissal is not relevant to this appeal, was the CEO of Agriwane. These CEO's were the only link between the Board of Directors of their respective parastatals and management. These corporations were parastatal organisations created by statute to advance separate development in the KwaNdebele and Kangwane homelands. They were both incorporated in the Eastern Transvaal Province which is now known as the Mpumalanga Province.

[3] As early as 1993 the Appellants were aware of the fact that with the advent of the new political dispensation, the KNDC and KEDC would, together with Agriwane, be incorporated into one development corporation. They both attended meetings between March 1994 and November 1995 at which it transpired that the KNDC, KEDC and Agriwane would be disbanded and only one development corporation would be created in Mpumalanga which would be headed by a managing director. The positions of the CEO's of the homeland development corporations would become redundant. The Appellants understood and endorsed the need for the amalgamation. They both played an active role in this transformation process. On numerous occasions the Appellants were informed that the status quo could not be maintained and that their positions in the new structure that was to be created could not be guaranteed.

[4] The homeland development corporations were *de facto* dismantled in July 1995. The members of the Board of Directors of these corporations were relieved of their duties.

The Appellants reported to an interim structure (Board of Directors) under the chairmanship of Mr Eugene Nyathi and later to Mr Mabuza who was the Executive Chairman of the new MDC Board of Directors. Mr Nyathi stripped the Appellants of all the authority and functions they used to have and delegated to them such authority and functions as he deemed necessary for the day to day operations of the corporations. Mr Mabuza followed suit.

[5] The Eastern Transvaal Development Corporation Act No. 4 of 1995 (“the Act”) came into operation on 01 November 1995. Its object was ‘to provide for the establishment of the Eastern Transvaal Development Corporation Limited, for the transformation, restructuring and amalgamation of existing development corporations and their subsidiaries . . . and to complement the reconstruction and development program . . .’

[6] Section 40 of the Act repealed the KwaNdebele Corporations Act No. 2 of 1985 and the Kangwane Corporations Act No. 4 of 1985 which created the previous development corporations headed by the Appellants. The Act changed the name of the new corporation, which is referred to in paragraph [5] above, to Mpumalanga Development Corporation.

[7] The Respondent took transfer of all the assets and liabilities of the old development corporations and all the employees of the homeland corporations were deemed to be employed by the Respondent subject to rationalisation arrangements in terms of section 41(3) of the Act.

[8] The Act gave no security of tenure to any employees. Their contracts of employment were deemed to be transferred from the old development corporations but subject to rationalisation arrangements. Though the Act does not define what rationalisation arrangements are, its long title contemplates rationalisation to include transformation, restructuring and amalgamation of existing development corporations and their subsidiaries.

[9] After the Act came into operation, the Appellants continued to perform functions delegated to them by Mr Mabuza. The Appellants identified two possible positions that they could occupy in the MDC. One was that of a managing director, the other of regional CEO’s. They were not appointed to these positions. Although they applied for the managing director position, and were short listed, Mr Mogorosi was eventually appointed to that position. Mr Mabuza explained that the Appellants were not given or offered the positions of regional CEO’s because his vision of regional CEO’s did not include the Appellants. The Appellants did not challenge the failure of the Respondent to appoint them to the positions of regional CEO’s.

[10] The services of the Appellants were terminated by Mr Mogorosi on 14 March 1996.

The reason he furnished for the Appellants' dismissal is that the appointment of the managing director had rendered their positions redundant and non-existent. He also highlighted the need to avoid a duplication of functions which would result from their continued employment. He went on to determine severance packages for the Appellants which they accepted and spent.

[11] The Industrial Court treated this case as a retrenchment case. The Appellants contend that there was no valid reason for their dismissal and that they were not retrenched but merely dismissed for no valid reason. The payment of severance packages which is made only in cases of retrenchment, the fact that the new corporation was admittedly being transformed, and the reasons given by Mr Mogorosi for the Appellants' dismissal have convinced me that they were dismissed for operational reasons. Therefore I will deal with this matter on the basis that the Appellants were retrenched. I turn now to consider the substantive fairness of the Appellants' retrenchment.

SUBSTANTIVE FAIRNESS

[12] The Act amalgamated the three homeland development corporations and established a new corporation to serve the needs of the whole province. It also created the position of a managing director. This position is the embodiment of the pre-existing CEO positions in the old corporations. When the new managing director was appointed he not only assumed all the functions and responsibilities the Appellants used to have, but he also became the only official link between the Board of the new corporation and management. The creation of the position of managing director and the appointment of the incumbent rendered the positions of the Appellants redundant.

[13] In so far as there was a possibility that some vacancy could arise for regional CEO's, those positions did not exist at the time of the Appellants' dismissal. Furthermore, once those posts were created, they would have been advertised and it is not the Appellants' case that they applied but they were not appointed. It was not for the Industrial Court or this Court to speculate about whether or not the Appellants should or could have been appointed if those vacancies were advertised.

[14] I am satisfied that the Appellants' dismissal was substantively fair. I deal with the relief sought herebelow.

THE RELIEF SOUGHT

Reinstatement

[15] The Appellants seek reinstatement with full back pay. In dealing with this aspect it is important to bear in mind that the Industrial Court, though it found that the dismissal of the Appellants was procedurally unfair, had a discretion whether or not to reinstate the Appellants. (See PACT v PAPER PRINTING WOOD & ALLIED WORKERS' UNION & OTHERS (1994) 15 ILJ (A) at 78A-B).

[16] In the exercise of that discretion the Court *a quo* obviously had to take into account that the dismissal of the Appellants was substantively fair, that the Appellants received generous severance packages, and the fact that the new corporation was in the process of being dissolved must have weighed heavily against making an order for reinstatement. Furthermore, the Appellants did not, at the time of their dismissal, occupy any positions to which they could be reinstated. Their positions had become redundant and non-existent.

[17] I am satisfied that the Industrial Court cannot be faulted for not reinstating the Appellants.

Compensation

[18] The Appellants seek compensation as an alternative to reinstatement. The first Appellant seeks compensation of R2 366 009.00 while the second Appellant seeks compensation of R2 628 700.00.

[19] The Appellants received severance packages. The first Appellant received a package of R519 659.00 and the second Appellant was paid R381 000.00. They contend that the Industrial Court erred in not awarding them compensation notwithstanding the fact that the Industrial Court found their dismissal to be procedurally unfair.

[20] The effect of the reasoning of the Industrial Court is that, although the Appellants were entitled to compensation, the severance packages that were paid to them were so generous that the compensation that it would otherwise have awarded them would not have been more than those packages. The Industrial Court effectively treated those packages as if they included a measure of compensation and was satisfied that they adequately addressed the complaint which could have been addressed by an award of compensation.

Clearly the Court was satisfied that the packages were so generous that no additional compensation was necessary. I am satisfied that there is no basis for interfering with the decision of the Industrial Court in this connection.

[21] The appeal must fail on the merits.

COSTS

Costs of the Industrial Court

[22] The Appellants contend that the Industrial Court erred in not awarding them costs. This submission ignores the fact that both parties were successful in the Industrial Court. The Appellants only succeeded to prove that their dismissal was procedurally unfair. The Respondent successfully demonstrated that the Appellants' dismissal was substantively fair and that the Appellants were not entitled to compensation in addition to their generous severance packages. The Appellants therefore attained some insignificant victory whereas the Respondent achieved substantial and meaningful success. I cannot therefore see any basis for interfering with the way the Industrial Court exercised its discretion with respect to costs. The other costs to consider are costs of this appeal.

Costs of Appeal

[23] Three matters are relevant to the issue of costs on this appeal. They both have to do with the manner in which the Respondent's attorneys have handled this appeal. The first is that, after the Appellants' attorneys had served the Appellants' application for the condonation of the late delivery of the record on them, they decided not to file any affidavits to oppose the application. They had not perused the record to satisfy themselves that the record that had been filed was complete and contained all evidence and documents which were material for the proper determination of the appeal. A few days before the date of the hearing of the appeal, the parties filed a notice of the removal of the appeal from the roll. When this notice was brought to the attention of the Judge President, the Judge President directed that any party who wanted the matter to be postponed or removed from the roll would have to make a substantive application which would be heard on the date of the hearing of the appeal. On the morning of the hearing of the appeal, the Respondent filed an application for the postponement of the appeal. The filing of that application is the second matter which is relevant to the issue of costs.

[24] The application for the postponement of the appeal was filed so late that the Appellants were not afforded any opportunity to prepare opposing affidavits. The Court also had no time to read the application papers before the matter could be

called in Court. The basis for the application was that a certain exhibit “O” was missing from the record. This caused the Court and, no doubt, the Appellants’ attorneys and counsel immense inconvenience. Had the Respondent’s attorneys examined the record soon after it was served on them with a view to determining whether it was complete and proper, they would have decided whether exhibit “O” was relevant. As it turned out during argument, exhibit “O” was not material to either party’s case and should not have formed any basis for a postponement application. Mr Tip withdrew the application after it transpired that exhibit “O” was not material. All this could have been avoided if the Respondent’s attorneys had examined the record timeously as it was their duty to do so. If, in doing this, they were hampered by the fact that other attorneys had represented the Respondent in the Industrial Court, they could have enlisted the assistance of those attorneys. They failed to do so.

[25] The third matter which is relevant to the issue of costs is the fact that the Respondent filed its heads of argument late. Although the Court allowed the Respondent to oppose the appeal, this conduct on the Respondent’s part caused further inconvenience to the Court.

[26] The Court views the manner in which the Respondent or its legal representatives have handled the Respondent’s opposition to the appeal very seriously. I consider that this is a proper case in which it should mark its disapproval with an appropriate order of costs. In my view an appropriate order of costs would be one in terms of which: (a) the Respondent’s attorneys are ordered not to charge the Respondent any fee for perusing the record; (b) the Respondent’s attorneys are ordered not to charge the Respondent any fee for the postponement application; (c) no order is made as to costs.

[27] In the result, I make the following order:

- “(a) The appeal is dismissed;
- (b) The Respondent’s attorneys are not to charge the Respondent any fee in connection with the perusal of the record;
- (c) The Respondent’s attorneys are not to charge the Respondent any fee for the postponement application;
- (d) There will be no order as to costs.”

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APPEAL

I agree

**M.T.R. MOGOENG
JUDGE OF**

**R.M.M. ZONDO
JUDGE PRESIDENT**

I agree

**J. TRAVERSO
ACTING JUDGE OF APPEAL**

Appearances

Appearing for the Appellant : K.S. Tip SC (with him F.A. Boda) *instructed by* Maserumule Incorporated

Appearing for the Respondent : E.S.J. van Graan *instructed by* Mac Roberts de Villiers Lunnon & Tindall Inc.

Date of hearing : 07 September 2000

Date of judgment : 15 February 2001