

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

Case No: JA51/2004

In the matter between

**FIDELITY SPRINGBOK SECURITY SERVICES
(PTY) LTD**

APPELLANT

And

E. RADEBE

RESPONDENT

JUDGMENT

COMRIE AJA

- [1] The respondent was employed by the appellant as a security officer. She claimed in the court *a quo* to have been dismissed by the appellant with effect from 30 October 2001. Todd AJ held that the respondent had indeed been dismissed on that date. He found that the dismissal was both substantively and procedurally unfair. He ordered retrospective reinstatement coupled with compensation. The appeal is with leave granted by the court *a quo* on 30 November 2004.

- [2] Also before us are two related applications. The first, filed on 23 March 2005, is by the respondent and seeks an order in effect declaring that the appellant has abandoned the appeal. The second, filed on 23 May 2005, is by the appellant and seeks an order condoning the late filing of the appeal record, which only occurred on 11 May 2005. I should mention that when that record was filed, it was incomplete. Omitted was perhaps the most important document of all, namely the judgment under appeal. It was attached to the appellant's heads of argument, accompanied by this cryptic statement: *"In so far as it may be required, condonation will be sought at the hearing of this matter for this error."*

Dismissal

- [3] The factual background to the matter is as follows. The respondent was stationed at the M-Net site where she had been deployed for about two years. On 8 October 2001 she was instructed by the appellant's site manager, a Mr Jenkins, to return to the appellant's office. This was allegedly pursuant to a request by the client, M-Net, that the respondent be removed. The fact of such request, and the underlying reason therefor (if one was required), were never proved. It was stated by the appellant's witness that a client had an absolute right to call for the removal of a guard, and the client's request would not be challenged unless it happened often. It was also stated that a guard should not be situated at one site for too long as that tended to breed familiarity, which was not a good thing in the security business. The respondent claimed that Mr. Jenkins

was fairly new to the site and had his own agenda for removing long- service staff there.

- [4] Be that as it may, the respondent reported to the appellant's office where she was seen by Ms. Nel, the personnel manager. Ms. Nel handed the respondent a letter dated 8 October 2001 reading as follows:

*“RE: REDUNDANT POSITION – POSSIBLE
RETRENCHMENT*

Due to the client requesting your immediate removal from the M-Net contract and the unavailability of posts at Fidelity Springbok Security services, your position will possibly become redundant and it is possible that you will unfortunately be retrenched effective 30 October, 2001.

Donette Nel will be available to meet with you and your representative at 08h00 on Tuesday 16 October, 2001 to discuss the relevant issues, which will include amongst others:

- 1. Proposed date, if retrenchment becomes unavoidable;*
- 2. The obvious search for an alternative to your retrenchment;*
- 3. Discussions concerning any retrenchment payment;*
- 4. Any assistance that may be afforded by the company to you.*

Should any other issue arise with reference to section 189 of the Labour Relations Act 66 of 1995, this also will obviously form part of your discussion.

Should an alternative not be found and a retrenchment be effected, this letter will serve as notice of termination of service.”

- [5] This was apparently a standard form of letter used by the appellant in such circumstances. Ms. Nel stated in evidence that, despite the letter’s terms, she had previously never had to dismiss a “removed” employee; a position at another site had always been found, unless the employee took voluntary retrenchment. However, the respondent, realising that her job was in jeopardy, consulted her union which, on 15 October, wrote to Ms. Nel alleging victimisation and threatening “*to refer a matter of unfair suspension to the CCMA.*” The union had in mind “*the reinstatement of our client to her post*” (ie. the M-Net post). It was common cause that the respondent called at the appellant’s office on 16 October. What happened on that occasion was in dispute. The trial court found that the respondent had been uncooperative and caused a commotion, but that her conduct had been exaggerated by Ms. Nel. On this finding it should be accepted that Ms. Nel was not able to “*consult*” with the respondent, nor to tell her that an alternative position had been found. That position fell away but, according to Ms. Nel, another post later became available at Kyalami Estates for a female guard. Female guards are

in short supply and the post, according to Ms. Nel, would have been offered to the respondent had she reported to the office.

- [6] On the same day, 16 October, Ms. Nel wrote to the union in a firm tone. She refuted the allegation of victimisation. She recorded that the respondent had not reported to the office on a daily basis as requested. She said that in two and half years she had never had to retrench an employee except on a voluntary basis. The letter continued:

“Alternative positions have been found for Miss Radebe, however, her serious allegations and total untrue statements in my office this morning has left me doubting her honesty and my Managers mistrusting her ability.”

The respondent’s disruptive conduct was particularised. The letter ended by recording that the respondent had intimated that future dealings must be with her attorneys, whose identity was requested.

- [7] This letter elicited an acerbic response from the union dated 18 October 2001. No point is served by summarising it. I quote the penultimate paragraph:

“Indeed if you do not inform us of when Ms. Radebe is to report to work by close of business today, we will have no other alternative but to refer a dispute for unfair suspension; and should you not have responded within 30 days from [9 October], would refer an unfair dismissal (operational requirements) to the CCMA”.

It is possible, in the context of the whole letter, to read this paragraph as continuing to insist on reinstatement to the M-Net post.

- [8] On behalf of the appellant its “*Group I R Director*,” Mr Myburgh, replied on 23 October 2001. The letter is worth quoting in full, but I invite particular attention to paras. 5 and 7:

“My department will communicate with you in future.

Your letters dated 15 October 2001 and 18 October 2001 refers.

We wish to advise as follows:

- 1. As a result of the client requesting the replacement of the compliment of security officers, Miss. Radebe’s position at M-Net has become redundant which obviously makes her a candidate for possible retrenchment if an alternative is not found.*
- 2. We do not share your legal opinion with regard to the LRA.*
- 3. The Personnel Department has been instructed to proceed with the consultation process. In this regard we wish to point out that Miss. Radebe has neglected to report to the office of Ms. Donette Nel as instructed. As she does not meet the requirements of a “spare” as*

defined in Sectoral Determination 3, she is consequently not entitled to payment whilst without a post. She has not been suspended.

Miss Radebe has been disrupting the consultation process and has in fact stated that she would have no further dealings with the Personnel Office, and preferred to deal through her attorneys.

- 4. The fact that Miss. Radebe is a member of good standing at SERTAWU does not reflect from our financial records in terms of stop orders and it is suggested that you submit proof of same.*
- 5. We deem it unnecessary to respond to other allegations contained in your letters, and our choice to do so should not be interpreted as an admission of any statement of fact.*
- 6. Miss. Radebe will not be re-instated in her post at M-Net. If an alternative is not found, she will be retrenched, in absentia, if necessary, should she choose not to partake in the consultation process.*
- 7. Please advise Miss. Radebe to be co-operative and report to the office of Donette Nel. We are not prepared to debate this issue with you further by means of correspondence.”*

- [9] Whether or not the respondent reported to the office and saw Ms. Nel on 25 October was also in dispute at the trial. The respondent claimed in evidence that she did so, that nobody paid any attention to her, and that Ms. Nel did no more than take a quick peek at her. The allegation that she so reported did not form part of the respondent's statement of claim. It first surfaced, a year later, in an application for condonation. Ms. Nel seriously doubted the truth of the allegation and said that she **"would like to see the book."** The attendance register was not adduced in evidence. The trial court acceptance that the respondent did in fact attend at the appellant's office on 25 October, though no communication with Ms. Nel occurred.
- [10] As I have said earlier, Ms. Nel testified that an alternative position was found for the respondent at the Kyalami Estates site. This was not communicated to the respondent (or her union) because, it was claimed, the respondent failed to report to the office. Ms. Nel could not explain why Mr. Myburgh (who did not testify) had not offered the post in his letter to the union. The 30th of October 2001 came and went, and nothing overtly happened. The respondent did not tender her services again. The appellant did not consciously decide to dismiss or retrench her; it wrote no letter to that effect, either to her or the union; and the respondent's name remained on the appellant's payroll records for several months before it was removed for administrative reasons (because she had not reported for work).
- [11] The trial court found that on a proper construction of the correspondence in the factual context, the appellant in fact

dismissed the respondent with effect from 30 October 2001. This conclusion was not altered by the facts that the appellant did not write a confirmatory letter or remove the respondent's name from the payroll. The learned Judge said:

“Quite simply, if the [appellant] had decided, following the letter of 23 October 2001, that it would not dismiss the [respondent] it must necessarily have written to her to communicate this to her. In the absence of doing so, the letters of 8... and 23 October 2001 served to terminate the [respondent's] employment on the grounds of operational requirements with effect from 30 October 2001”

It is clear from another passage in the judgment that this was the key finding, namely: that the respondent was taken to be dismissed unless advised by the appellant, in writing, to the contrary (which admittedly did not happen). Another witness, Mr. Vetter, said that the appellant did not operate in this way and that a dismissal, if it occurred, would have been communicated by a separate letter.

[12] I turn to consider the soundness of the trial court's conclusion. I have earlier quoted both the letters of 8 and 23 October in full. It will be recalled that the first letter purported to invoke s. 189 and concluded with this sentence:

“Should an alternative not be found and retrenchment be effected, this letter will serve as notice of termination of service”

Mr. Myburgh's letter of 25 October concluded:

“6. Miss. Radebe will not be re-instated in her post at M-Net. If an alternative is not found, she will be retrenched, in absentia, if necessary, should she choose not to partake in the consultation process.

7. Please advise Miss. Radebe to be co-operative and report to the office of Donette Nel. We are not prepared to debate this issue with you further by means of correspondence.”

[13] It is evident that, whoever's fault it may have been, there was no real consultation between the parties with regard to finding an alternative position for the respondent; and that such a position (whether at Kyalami Estates or elsewhere) was nor offered to the respondent and therefore was not accepted by her. The respondent was not reinstated in her post at M-Net; nor was she appointed to another post. In these circumstances it seems to me that the two letters clearly conveyed to the respondent that she was dismissed with effect from 30 October 2001. It may be, as Mr. Vetter testified, that this was not in accordance with the appellant's usual procedure, and it may even be that privately the appellant did not intend to dismiss the respondent. However, as Wessels JA observed in a slightly different context:

“The law does not concern itself with the working of the minds of the parties to a contract but with the external manifestation of their minds”.

South African Railways & Harbours v National Bank of South Africa Ltd 1924 AD 704 at 715. Here the external manifestation of the appellant's mind is to be found in the two letters. Their effect was to tell the respondent that unless she was appointed to another post (which did not happen), she was dismissed; that such dismissal would be effected in absentia, if necessary; and that a further letter of termination would not be required.

- [14] To determine whether or not the respondent was dismissed (as distinct from fairly dismissed), it matters not in my view: that the respondent might have continued to insist on reinstatement in the M-Net post; or that she might not have attended the Robertville office on 25 October (contrary to the trial court's finding); or that she might have refused the Kyalami Estates post had it been offered to her (she stated in evidence that she would have accepted). These matters may or may not be germane to fairness. They detract in the context from the issue of dismissal. I should add that in this case there can be no question of the two letters having been written without the authority of the appellant's management. The letter of 8 October, according to Ms. Nel, was in standard form, and was part of the company's policies and procedures. The author of the letter of the 23 October, Mr. Myburgh, was "*Group I. R. Director*", an apparently senior position. I conclude that the trial court was correct in finding that the respondent was dismissed with effect from 30 October 2001 (an issue on which she bore the *onus* of proof).

Fairness

[15] The appellant bore the *onus* of proof on this issue. The trial court found that it had failed to discharge that *onus*, which is not so surprising given the appellant's case that it had neither dismissed the respondent, nor intended to do so. A fair reason for the dismissal was not contended before Todd AJ. On appeal, however, Mr Hutchinson urged in the alternative that the dismissal (if such it be) was substantively fair. He relied on the respondent's insistence on reinstatement in the M-Net post which, he submitted, would have continued had she been offered the Kyalami Estates post. He relied too on the respondent's uncooperative attitude on 16 October 2001. And he submitted that the court *a quo* was wrong in finding that the respondent had reported to the Robertville office on the 25 October 2001. I deal with the last point first. I have reservations about the correctness of the finding in question, given that such a significant event did not feature in the statement of claim, as one would have expected, but was first alleged a year later. On the other hand the attendance register, a mandatory record in terms of the applicable Sectoral Determination, was not adduced in evidence. On balance I think this finding of fact cannot be said to have been clearly wrong. As such it cannot be reversed on appeal.

[16] In my opinion a primary difficulty with fairness lies in the procedure adopted by the appellant when an employee (such as the respondent) is removed from a guarding site in circumstances where no disciplinary action (or at any rate no serious disciplinary action) is contemplated. The standard procedure, which was followed in this case, is to issue the employee with a letter in terms of s. 189 of the Labour Relations Act 66 of 1995 (in this case the

letter of 8 October 2001). While this procedure may be technically competent, it flies in the face of the evidence of Ms. Nel that compulsory retrenchments never happened for this reason, and that alternative positions were always found (unless the employee chose voluntary retrenchment). Why, one wonders, was such a letter issued in the first place when compulsory retrenchment was no more than a remote possibility? Ms. Nel could not explain it, since she had not devised the policy. She claimed in evidence that M-Net had given a reason, via Mr. Jenkins, for requesting the respondent's removal from the site, but she could no longer remember the reason. Indeed, no reason was presented to the trial court (or, as far as we know, to the respondent), and the appellant was not in the habit of challenging a client's request.

- [17] It must come as a considerable shock to an employee (such as the respondent) who is removed from a site, without a given reason, to be told by management that in consequence your job is in serious jeopardy. It is little wonder that the respondent was cross and uncooperative and sought independent advice. The position is aggravated rather than mitigated by the fact that on the evidence, the letter of 8 October does not really mean what it says. The reference in the first paragraph to "*the unavailability of posts at Fidelity Springbok*" was a gross overstatement; especially in the case of a female security officer (I have already noted the short supply). The statements in the same paragraph that "*your position will possibly become redundant*" and that "*it is possible that you will unfortunately be retrenched*" were statements of remote possibility rather than of practical reality. The issuance of the letter of 8 October 2001 was inappropriate in the circumstances under

review, and it got the parties off to a bad start. The position was not eased when the respondent took umbrage and consulted a union, which took a tough stance. The appellant's attitude in turn hardened. None of this was conducive to sensible or sensitive labour relations.

- [18] Why then was the respondent dismissed? It was not for the lack of an alternative position; we have Ms. Nel's word for that. It was because the respondent was not offered, and therefore could not accept (or refuse), an alternative position that was available. Mr. Myburgh wrote to the union on 23 October: "*We are not prepared to debate this issue with you further by means of correspondence*". That was unfortunate because, in the tense relationship that prevailed, it should have not in my view have been above Mr. Myburgh (or Ms. Nel on his behalf) to communicate the Kyalami Estates position to the respondent in writing via her union. We know that the position was not communicated to her on 25 October, whatever the reason may have been. Having inappropriately initiated a s.189 process, with which the respondent was less than cooperative, the appellant dismissed the respondent for failing to accept a position which was not in fact offered to her, although it should have been. In my judgment that cannot be a fair reason for the dismissal. The position is not saved for the appellant by the possibility that the respondent (contrary to her evidence) might have turned down the Kyalami Estates position, had it been offered to her. That was not established on the probabilities; and even if it had been established, other aspects (such as propriety of the removal) would have come into sharper focus.

Relief

[19] At the time of the trial and judgment (October 2004), three years after the dismissal, the respondent was roughly half way through a 12 month contract with another employer. The court *a quo* fashioned the following order:

“3. *The respondent is ordered to re-instate the applicant retrospectively on the terms and conditions of employment, and in the same or similar position and at the same level of remuneration, as applied at the time of her dismissal. The Respondent shall satisfy its obligations to pay arrear remuneration arising from the retrospective effect of this order by paying to the Applicant a fixed amount of R 25 956.00. The amount of R 25 956.00 shall be paid to the Applicant within 14 days of this order irrespective of whether the Applicant tenders her services as a result of her re-instatement in terms of this order.*

4. *If the Applicant wishes to take up employment with the Respondent as a result of her re-instatement in terms of this order, she is required to present herself to the Respondent’s head office and tender her services by no later than 14 days following the date of this order, failing which the Respondent shall not be required to re-instate her, but this will not release the Respondent from its obligations referred to in paragraph 3 of this order.”*

[20] I should make two comments. The first is that the sum of R 25 956.00 represented retrospective compensation for 12 month's remuneration and no more. The second comment is that para. 4 of the order put the employee to her election: either to claim reinstatement and give up her temporary job, or to forego reinstatement and continue in her temporary job.

[21] Mr. Hutchinson's sole attack, as I understood him, was on the back- pay of R25956.00. He invoked the very recent decision of this Court in *Chemical Workers Industrial Union and Others v Latex surgical Products (Pty) Ltd* (judgment dated 25 November 2005, as yet unreported) from para. 103. At para. 116 Zondo JP, writing for the Court, concluded as follows:

“116. In the light of all the above I conclude that it is not competent to order a retrospective operation of a reinstatement order (even if limited) which is in excess of twelve month's in an ordinarily unfair dismissal case. Accordingly, in this matter, retrospective operation of the order of reinstatement that I propose to grant has to be 12 months or less but not more. That is part of the limitation on my discretion to order that the reinstatement of the individual appellants operate with retrospective effect.”

[22] Mr. Hutchinson accepted the obvious, namely that Todd AJ had not exceeded the 12 months' limitation. He referred us, however, to passages in the judgment of the court below indicating that the learned Judge proceeded from the assumption that it was

competent for him to order more than 12 months. The argument is well founded. Indeed the court below said:

“justifies a conclusion that the Applicant should not receive a full indemnity for the income that she has lost during the period since her dismissal.”

It follows that Todd AJ misdirected himself as to the extent of his discretion, and that his order is in his respect open to reconsideration on appeal. It does not follow that we must adopt the same yardstick as the court below (which Mr. Hutchinson suggested was one third of 3 years). On appeal we must exercise our own discretion and substitute it for the discretion of the trial court.

- [23] The respondent’s dismissal was both substantively and procedurally unfair. It was precipitated by the appellant’s unwise and inappropriate invocation of s. 189. It culminated in the appellant’s failure to offer an available alternative position to the respondent, either by letter to the union or in person when she reported at the office on 25 October. By the time of the trial and order the respondent had been unemployed for approximately 30 out of 36 months. Moreover, having eventually obtained an alternative position elsewhere, the order put her to an uncomfortable election. It is true, as the court below observed, that she and the union can be criticised for lack of cooperation. I do not consider that this is worth much, if any weight in the overall assessment. I would award the full 12 months’ permitted by the

statute and I would accordingly not interfere with the order made by the court *a quo*.

Condonation

[24] Leave to appeal was granted by the court below on 30 November 2004. The record of appeal should have been filed by 30 January 2005. The transcribers were promptly instructed to prepare the record. Due to an error on their part, only the leave to appeal proceedings were transcribed, which transcription was delivered on 28 January 2005. The transcribers were thereupon instructed to prepare the complete record. The appellant's attorneys then applied for an extension until 1 March 2005. Although the application was filed at the Labour Court, Johannesburg, it does not appear from the file that any order was made. However, the transcription was not completed until the end of April 2005. Thereafter the record had to be "*compiled, indexed, paginated, copied and served and filed.*" It was filed on the 11 May 2005, thus 3 ½ months late. The filed record was incomplete: omitted was the judgment under appeal. That omission was inexcusably slack. The record itself, *sans* judgment, is not lengthy; it runs to some 250 pages.

[25] On 23 May 2005 the appellant's attorneys filed an application for condonation of the late filing of the record of appeal. It described the delay as "*minimal*" and laid all the blame at the door of the transcribers. We are not told what steps the attorneys took to hurry the transcribers up in the three months after 30 January, by which time the record was already late. There is no confirmation before us from the transcribers accepting any or all of the blame. There is

no formal application for condonation of the incomplete record; nor are we told how the omission of the judgment under appeal came about.

- [26] Against these imperfect explanations we must weigh the prospects of success on the merits. *Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 (A). I have already considered the merits in detail and I have concluded, for the reasons set out earlier, that the appeal must fail. The prospects of success are therefore nil. I would accordingly refuse condonation in the several respects in which it is sought. It is unnecessary to rule on the respondent's application dated 23 March 2005.

Order

- [27] The order is as follows:

1. Condonation in the several respects sought by the appellant is refused with costs;
2. No order is made on the respondent's application dated 23 March 2005;
3. (a) The appeal is dismissed with costs;
(b) The periods of 14 days mentioned in paragraphs 3 and 4 of the order of the court *a quo* are directed to run from the date of the handing down of this judgment.

COMRIE AJA

I agree

NICHOLSON JA

I agree

McCALL AJA

Appearances:

For the Appellant: Mr. B Hutchinson instructed by Snyman
Attorneys

For the Respondent: Mr. S Sebola of the Retail and Allied Workers
Union

Date of Hearing: 7 December 2005

Date of Judgment: 8 March 2006

