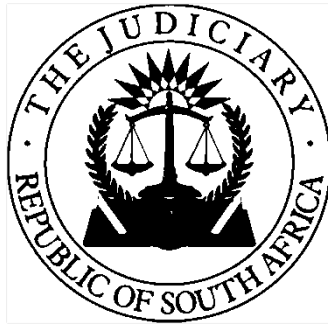




IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JA 65/14

In the matter between:

CMH LUXURY MOTORS (LYNDHURST) PTY LTD

T/A LYNDHURST AUTO

Appellant

and

MOTOR INDUSTRY STAFF ASSOCIATION

First Respondent

SANJEEV CHOTAN

Second Respondent

Heard: 21 May 2015

Delivered: 24 June 2015

Summary: Reinstatement of appeal and condonation for the late filing of practice note and heads of argument – retrenchment – employer contending that employee agreeing to be retrenched – probabilities favouring employee as to what led to his retrenchment – employer witness not credible - evidence proving retrenchment a *fait accompli* – employee’s dismissal substantively and procedurally unfair – Labour Court correct in favouring employee’s version – no merits on appeal - application for condonation dismissed.

Coram: Waglay JP, Ndlovu et Landman JJA

Neutral citation: **CMH Luxury Motors (Lyndhurst) Pty Ltd v Chotan and Another**
(LAC: JA 65/14)

JUDGMENT

LANDMAN JA

Introduction

[1] The appellant, CMH Luxury Motors (Lyndhurst) Pty Ltd t/a Lyndhurst Auto, appeals against the whole of the judgment of the Labour Court (Gaibie AJ) that found that Sanjeev Chotan, the second respondent, a member of the Motor Industry Staff Association, the first respondent, had been unfairly retrenched and awarded him compensation and costs. The appeal is with leave of the court *a quo*.

Reinstatement of the appeal

[2] The appellant filed an application for condonation and reinstatement in September 2014, a further application for condonation in April 2015 and a third application in May 2015. The appellant was remiss in failing to deliver timeously the record, the power of attorney, its practice note and heads of argument concerning the applications for condonation.

[3] The appellant has provided an explanation for its failure to comply with the Rules of this Court and directives issued concerning the appeal. The explanations are not altogether satisfactory but, if the merits of the appeal favour the appellant, condonation should be granted. I turn to consider the merits of the appeal.

The basic facts

- [4] The second respondent was a trained motor vehicle diagnostic technician. He was employed by the appellant as a workshop foreman in what was known as the appellant's Formula 1 and Mini workshop. He had been in the employ of the appellant for just less than a year. Mrs Natasha Petersen, a consultant and after Sales Manager, was assigned by the holding company to deal with problems at the appellant's dealership. By 24 May 2011, she had investigated certain matters and drafted a new structure for the dealership.
- [5] On 24 May 2011, she spoke to the second respondent and handed him a letter advising him that the appellant was restructuring and that he could possibly be retrenched. She also followed the same procedure as regards Ms Silvaggi (now Mrs Dos Santos), a booking clerk. No other employees were in danger of being affected by the proposed restructuring.
- [6] It is the appellant's case that on 24 May 2011, the second respondent informed Mrs Petersen that he no longer wanted to work there and that she should seek a position for him elsewhere in the group. He was dismissed on 2 June 2011.
- [7] Notwithstanding the narrow issues, the parties generated a record of 628 pages and the appellant and the respondents filed heads for the purposes of this appeal of 31 pages and 121 pages respectively.

The judgment of the court a quo

- [8] The court *a quo* dealt with the matter succinctly. The court found that prior to the interview on 24 May 2011, the appellant had decided to retrench "non-productive staff" and that either Ms Silvaggi or the second respondent would be retrenched. The organogram drafted by Mrs Petersen showed that the second respondent's post would be abolished and replaced by a newly created lower level post of junior workshop controller. The restructuring process was a *fait accompli* when the second respondent was given the letter on 24 May. The trade union, the first respondent, was not informed of the restructuring process. The court *a quo* found that the appellant had not proved that the second respondent agreed to be

retrenched. The court *a quo* found that the dismissal was procedurally and substantively unfair and awarded the second respondent compensation equivalent to 12 times his monthly remuneration and costs.

The grounds of appeal

[9] Reading through the appellant's heads, the following complaints about the judgment emerge. It is alleged that the court *a quo* erred:

- (a) in finding that the retrenchment was a *fait accompli*.
- (b) in rejecting the evidence of Mrs Petersen.
- (c) in not rejecting the evidence of the second respondent.
- (d) in not finding that, even if the decision was final, the second respondent was not prevented from persuading the appellant that there were other viable and acceptable alternatives to retrenchment.
- (e) in failing to find that the second respondent volunteered for retrenchment.
- (f) in awarding compensation to the second respondent.

[10] Mr Van der Westhuizen, who appeared on behalf of the appellant, directed his main challenge to the finding by the court *a quo* that the second respondent did not tell Mrs Petersen that he did not wish to be employed by the appellant but asked whether there was another place for him in the Group. The court *a quo* rejected Mrs Petersen's evidence and found the second respondent's evidence to be credible.

Evaluation: Did the second respondent decline to work at Lyndhurst?

[11] In evaluating the evidence of the witnesses on the issue whether the second respondent indicated that he no longer wished to work at Lyndhurst, I do so against the background of all the evidence tendered during the trial.

- [12] On 24 May 2011, during what Mrs Petersen describes as a quick meeting, she handed a letter to the second respondent which advised him that there was a possibility that he would be retrenched and that the process would be completed by 31 May. According to Mrs Petersen, she said to the second respondent that he must bring his ideas to prevent his retrenchment to the meeting on 30 May. He, in turn, said to her that she should speed up the process as he no longer wanted to work at Lyndhurst Auto. He also asked her to please find him another position within the Group. She asked him to give her his CV and he undertook to do so the following day. She asked him what position would he require and he replied that he sought a position as a service advisor. The second respondent then left her office and went to the service adviser for Formula 1, Mrs Chetty. Mrs Chetty fainted when he showed her the letter.
- [13] Mrs Petersen said she received the second respondent's CV on 24 or 25 May and she told him that she would talk to Mr Roger Manthey, an external HR consultant, about finding a possible position for him. She said he handed the CV to her. The proposed meeting on 30 May was cancelled as Mrs Naidoo, an employee of the HR consultant, was not available that day.
- [14] She received, by email, information about vacancies in the Group. She mentioned the vacancy for a service advisor in Hatfield Pretoria to the second respondent on 31 May at the lift. He said it was too far from where he lived in Lenasia.
- [15] The second respondent submitted a form requesting two days leave in the week following 31 May. She declined it because it was on short notice. The second respondent approached her and said she is slowing down the process and stopping him from going to Durban for interviews.
- [16] She advised the second respondent and Ms Silvaggi that there was to be a meeting on 1 June. At this meeting, she informed them that the retrenchment would continue and that the second respondent's last day would be the next

day. Ms Silvaggi accepted the position of junior workshop controller. The second respondent was instructed to effect the handover to her and explain certain functions to her. He then left the office.

[17] The second respondent did as he was instructed and before noon on 2 June, he reported to Mrs Petersen and said he was leaving. He would return on Monday to collect his documentation. But she did not see him again.

[18] The second respondent, who testified before Mrs Petersen did, denied that he had said he did not want to work at Lyndhurst. He did not request her to find him another position. She did not ask for his CV. He did not provide his CV to her. He requested leave and queried its refusal but did not say to her that she is slowing down the process or stopping him from going for interviews. He did inquire about the cancellation of the meeting. Mrs Petersen told him he would know his fate by the end of the next day. This utterance was not challenged in cross-examination.

[19] Mrs Petersen did not keep a note of the alleged conversations. No emails between her and Mr Manthey were disclosed. It was put to the second respondent that she inquired about a position for him but in her evidence she said she became aware of the Hatfield position through an email circulated within the Group. The alleged CV was not discovered. Mrs Petersen informed Ms Silvaggi that the second respondent had resigned. Some of the propositions put to the second respondent as to what Mrs Petersen would say were refuted when she testified eg that severance pay was discussed on 2 June. Other relevant aspects of her evidence were not put to the second respondent. It was not put to him that on 31 May, he asked Mrs Petersen why she was slowing down the process and stopping him from going to interviews in Durban. Later, Mrs Petersen said that she does not remember whether the second respondent asked her on 31 May when he was going to hear from her and when they would be proceeding with the meeting.

- [20] Apart from the testimony of Mrs Petersen, the appellant tendered some evidence to demonstrate that the second respondent was unhappy and was seeking other employment. The appellant sought to draw corroboration for Mrs Petersen evidence that the second respondent said he no longer wanted to work there. Mrs Ramman was one such witness but her testimony is unreliable in several respects. It is unsafe to draw this inference and in any event even if the second respondent was not entirely happy at Lyndhurst Auto, it cannot be found that he wanted to leave without the prospect of another position.
- [21] This issue depends upon the credibility of the two principal witnesses. The court *a quo* accepted the evidence of the second respondent and rejected the evidence of Mrs Petersen. There are no grounds for doubting the correctness of these findings. There is ample evidence of the unreliability of Mrs Petersen's testimony and unexplained discrepancies between the case put to the second respondent and her evidence. Consequently this ground of appeal must fail.

Fair retrenchment

- [22] Strictly speaking, it is unnecessary to canvas the remaining issues because the second respondent was not meaningfully informed of the reasons for the retrenchment and consequently was not placed in a position, nor given the time; nor the opportunity to suggest alternatives. This deficiency could not be cured at the trial although considerable time and effort was expended on it. Nevertheless I shall briefly address these issues.
- [23] Mrs Petersen established that the appellant had one so-called "non-productive" person more than the Group bench mark indicated it should have had. The result is that one "non-productive" person would have to go.
- [24] Mrs Petersen identified a problem with processing of job cards as regards the second respondent's workshop that impacted on warranty claims. But the second respondent was not told about this nor given an opportunity to defend himself. Mrs Petersen said that the customer satisfaction index showed

complaints about the Mini workshop services but conceded that the second respondent could not be blamed for this. Later she retracted this concession.

[25] Mrs Petersen said that the service department of the appellant (that of the second respondent and the other foreman) made a loss; their productivity was low. No investigation into poor performance regarding second respondent had been conducted. The productivity issue was not discussed with him at company level.

[26] The appellant had two workshop foremen; the second respondent and another. It was decided that in future one foreman would be sufficient. A template was altered on 1 May 2011 depicting this. The appellant decided that it would retain the other foreman. Mrs Petersen said that the other foreman had better qualifications than the second respondent had. She did not discuss this with the second respondent. This was also not put to him under cross-examination. The second respondent was not asked for comment on this issue.

[27] At the meeting on 24 May 2011, Mrs Petersen knew that it had been decided that either the second respondent or Ms Sivaggi would have to be retrenched. It seems that the second respondent earned more than Ms Sivaggi. Mrs Petersen did not disclose that the structure after retrenchment would exclude his position. She did not discuss the customer satisfaction index with him. There was no alternative position for him. She said the appellant also did not consider bumping a service advisor, a technician and a booking clerk (each having lesser service than the second respondent) in order to retain the second respondent. She did not offer the position of junior workshop controller to him. But it was her view that the second respondent could have persuaded the appellant to find an alternative position for him. This is simply not credible.

[28] The appellant decided that Ms Silvaggi would perform the clerical side of the second respondent's workshop functions. The appellant required the second respondent to give her basic training on an aspect of his job function before he left. After the second respondent had been dismissed, the appellant hired one

Van Heerden as workshop controller to perform a similar function as the second respondent had done. Van Heerden was remunerated at R17 500 pm; this remuneration was comparable to that paid to the second respondent.

- [29] The appellant did not take the second respondent into its confidence about the need to restructure. He may have been able to explain, as he did during the trial, why a qualified mechanic was needed to perform his function. His explanation may have convinced the appellant not to dispense with his services.
- [30] Nothing, save for a remark in passing at the lift about a position at Hatfield, was said or done to accommodate the second respondent. All the evidence points to the dismissal of the second respondent being a *fait accompli* before the letter of the proposed restructuring was handed to him.
- [31] The retrenchment was substantively and procedurally unfair.

The award of compensation

- [32] The appellant submits that the award of compensation equivalent to 12 months' salary is excessive. No suggestion is made in the heads as to what would be a suitable amount but counsel submitted that an amount equivalent to six months remuneration would have sufficed. The appellant complains that the court *a quo* did not provide reasons for granting the full extent of compensation permitted by the Labour Relations Act 66 of 1995. But the second respondent's evidence is that he was unable to obtain employment for a period of 12 months. The appellant's answer to this is that the second respondent was employed by the appellant for less than a year and that his evidence that he was unable to find employment is "seriously questionable". When the second respondent told his cross-examiner that he had emails concerning his job hunting, his cross-examiner took the view that they had not been discovered.
- [33] The appellant is at pains to point out to this Court that the second respondent was paid one week's compensation more than required but concedes this was payable in terms of the collective agreement. The second respondent was also

paid two weeks' notice pay more than he was entitled to. It does not appear that this was conveyed to the court *a quo*.

[34] I may have considered that slightly less than 12 month's compensation would have been appropriate but it has not been shown that the court *a quo* did not decide this issue judicially on the basis of the evidence and representations made to it.

[35] It follows that as there are no merits in the appeal, the applications for condonation should be refused.

Order

[36] In the result I make the following order:

“The applications for condonation are dismissed with costs but the costs associated with the respondent's heads of argument are limited to the costs of drawing 30 pages of heads.”

A A Landman

Waglay JP and Ndlovu JA concur in the judgment of Landman JA

APPEARANCES:

FOR THE APPELLANT: Adv Van Der Westhuizen

Instructed by Crafford Attorneys

FOR THE RESPONDENTS: Mr Gerrie Ebersöhn of Gerrie Ebersöhn Attorneys