REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

Case no: JS 571/10

In the matter between:

GENERAL INDUSTRIES WORKERS UNION OF SOUTH AFRICA	**Applicant**
BARNEY MALULEKA & 5 OTHERS	**Second to sixth Applicants**
and	
S DREIERS CC	**Respondent**

Heard: 16 May 2013

Delivered: 19 June 2013

Summary: (Default judgment - retrenchment).

DEFAULT JUDGMENT

LAGRANGE, J

Introduction

[1] Although the matter was opposed and the parties had concluded a pre-trial minute, the respondent did not appear at the trial proceedings. The respondent's attorneys filed a notice of withdrawal a couple of weeks before the trial date, but no other attorneys were appointed in their place. From the court file, it appears that the notice of set down was sent to them on 19 February 2013. In the absence of either the respondent or its representatives, the matter proceeded by default.

[2] Evidence was given by Mr M Molefe, an official of the union, and Mr B H Maluleka, the second applicant. Details of the individual applicants' earnings and age were confirmed in affidavits from each applicant.

[3] It was common cause on the pre-trial minute that the five individual applicants (the second to sixth applicants) had each signed written agreements on or about 15 December 2009 that they would retire on 31 December 2009 and would receive, in addition to statutory payments due, an ex-gratia amount in full and final settlement of all claims arising from their employment relationship.

[4] The employer alleged that during previous discussions on retrenchments in October 2009 it had been agreed with the individual applicants that they would go on "early retirement" at the end of December 2009. They claimed that they had been individually approached late in November 2009 and were casually informed that the job was finished and they must go on pension.

Material evidence

[5] Mr Maluleka testified that after the initial retrenchments had taken place in October 2009, there were rumours circulating at the end of November that year that there would be further retrenchments. He spoke to the union organiser and a letter was sent to the company on 27 November 2009, in which the union complained that the second and further applicants had been advised that the company wanted to retrench them, without advising

the union. The company's urgent response was requested, but none was forthcoming.

[6] Towards the end of December 2009, one N De Jager of the respondent contacted Molefe and advised him that the individual applicants had left work. He later received the purported agreements entered into by the individuals in terms of which they agreed to retire. None of these agreements presented in court were signed by the individuals, though both witnesses agreed that the applicants had signed a document, but could not identify or understand what they had signed. Maluleka, who claimed he had not been to school and was illiterate, said that De Jager had claimed he had spoken to Molefe when he asked them to sign documents in November 2009. When he received his payment in December 2009, he was surprised by the amount and went to query it and was told by De Jager that he was no longer working for the respondent.

[7] Molefe denied that the position of the individual applicants had been discussed during the pro-retrenchment consultations in September 2009 according to a copy of a contract of employment the agreed retirement age at the company was 65 years. At the time of their dismissals, none of the individual applicants had reached that age.

[8] Correspondence from the respondent’s employer organisation to the union at the end of December 2009 maintained that the applicants had not been retrenched but had requested retirement. An extract from one such letter dated 28 December 2009 reads:

> *"The agreements which were sent for your attention relate to those staff members who have requested that their services be terminated is direct result of retirement and should not be viewed as dismissal as result of operational requirements."*
>
> (*sic*)

[9] In the respondent's pleading, it did claim that these retirements flowed from the previous consultations, and were seen as a way of avoiding additional retrenchments. In this regard, it is curious that the individual agreements of retirement, which may have been signed by the second to further applicants, make no mention of the retirement being canvassed in

previous discussions, and are drafted in a manner that conveys the sense of an agreement reached with each individual. It is also noteworthy that these documents do not confirm that it was the employees who requested early retirement.

[10] The respondent had raised as a special plea the allegation that the individual retirement agreements were concluded in full and final settlement of all claims arising from the employment relationship. Certainly, there is a clause to that effect in those documents. However, there is no clear evidence before the court that the applicants did in fact consent to their retirement in writing, in the absence of any signed document to that effect. Moreover, the evidence suggests that they were not willing to terminate their employment and would not have raised their concerns with the union if that was the case. Further, the evidence before me does not confirm that there was an understanding reached in the earlier retrenchment discussions that a number of employees would be retired early subsequent to the retrenchments.

[11] On balance, I am satisfied that the probabilities do not favour the respondent's case and that it is more likely that the employer had used the device of retirement to avoid a further retrenchment exercise involving the individual applicants. A factor which might have played a role in this regard was the long service of the individual applicants, which would have resulted in significant severance payments to them if they had been retrenched. I am also not satisfied on the evidence that the individual applicants consented to their retirement freely and voluntary.

[12] On the evidence, the employer was unresponsive to the unions approach about the rumoured retrenchment of the individual applicants and only engaged with that after it had set the retirement process in motion. Even then, it did not engage with union with a view to consulting about early retirement as an alternative to retrenchment.

<u>Conclusion and relief</u>

[13] It does appear that, the respondent's business was contracting and there may have been a general need to retrench. However, in retiring the

individual applicants', the respondent did not follow a fair consultation process as envisaged in section 189 of the Labour Relations Act 66 of 1995 (the LRA). The selection of the applicants was based on their age, but none of them had reached the corporation's agreed retirement age. Termination of services on account of age prior to an agreed retirement age is specifically protected in terms of section 187 of the LRA. Although, the applicants did not claim that they had been dismissed for an automatically unfair reason on account of their age, it stands to reason that selection for retrenchment based on age prior to the agreed retirement age at a firm could hardly constitute a fair selection criterion.

[14] In the circumstances I am satisfied that the individual applicants were unfairly dismissed for operational reasons and their dismissal was both substantively and procedurally unfair.

[15] The applicants were apparently paid an amount of R1000 for every 10 years of completed service as a gratuity, and I have given consideration to this in determining the amount of compensation awarded. However, they were not paid any severance pay to which they were entitled. I understand from the evidence available that in the previous retrenchment exercise employees might have been paid two weeks' severance pay per year of completed service, but without more and in the absence of agreement the applicants are not entitled to more than the statutory amount of severance pay of one week per year of completed service.

Order

[16] The dismissal of the second to sixth applicants by the respondent on 31 December 2009 was a substantively and procedurally unfair dismissal for operational reasons.

[17] The respondent must pay each of the second to sixth applicants an amount equivalent to seven (7) months' of their respective monthly salaries and one weeks remuneration per completed year of service as severance pay, as set out in the table below.

Name	Length of Service (years)	Monthly Salary	Weekly Wage	Severance Pay due	Compensation due
T G Ramogolokgota	35	R 8 000.00	R 1 847.58	R 64 665.13	R 56 000.00
Joseph Pitsi	36	R 2880.00	R 665.13	R 23 944.57	R 20 160.00
Barney Maluleka	20	R 2120.00	R 489.61	R 9 792.15	R 14 840.00
George Madingwana	40	R 2880.00	R 665.13	R 26 605.08	R 20 160.00
Marcus Kekana	30	R 3240.00	R 748.27	R 22 448.04	R 22 680.00
Elliot Lekhuleng	41	R 2984.00	R 689.15	R 28 254.97	R 20 888.00

[18] The respondent must pay the applicants' legal costs.

[19] The payments stipulated in paragraph [17] above must be made within 15 days of the respondent's receipt of a copy of this order.

R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

FOR THE APPLICANTS: M Bayi of GIWUSA

FIRST RESPONDENT: No appearance