



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 1229/2009

In the matter between:

DERRICK NGWENYA AND 13 OTHERS

Applicant

and

ADMINICLE TRADING 17 CC

Respondent

Heard: 3 February 2014

Delivered: 11 February 2014

Summary: Unfair dismissal in terms of the provisions of section 189 of the Labour Relations Act. No procedure followed prior to retrenchment. Dismissal unfair

JUDGMENT

PRINSLOO, AJ

Introduction

[1] The Applicants approached this Court for relief as they claim that their dismissal was automatically unfair, alternatively their dismissal for operational reasons was substantively and procedurally unfair.

[2] The Respondent opposed the matter.

- [3] The matter was enrolled for trial on 3 February 2014 and prior to the commencement of the trial, the Respondent sought a postponement.
- [4] Before turning to the merits of the case, it is necessary to deal with the postponement application.

The application for postponement

- [5] The Respondent sought a postponement and advanced only one reason for the postponement, namely that it made an offer to settle the matter on 21 May 2013 and was still awaiting a response from the Applicants' attorneys, who acknowledged receipt on 23 May 2013 and gave an undertaking to revert to the Respondent, but failed to do so. Ms Pather for the Respondent submitted that because the Respondent did not know what the status of the settlement was, it was unable to prepare for trial and did not make any discovery of documents.
- [6] The notice of set down of the trial date of 3 February 2014 was sent to the parties on 10 October 2013.
- [7] Ms Pather submitted that the Respondent would be severely prejudiced if the matter is not postponed as it is not ready for trial and this prejudice outweighs the prejudice to be suffered by the Applicants. The matter has been frustrated since 2010 and another postponement would not prejudice the Applicants. The Respondent tendered the wasted costs associated with the postponement.
- [8] Ms Pather confirmed that after 21 May 2013 no further letter was written to the Applicants' attorneys to enquire about the possibility of a settlement, no steps were taken after the notice of set down was received in October 2013 to pursue and finalise the settlement, no formal application for postponement was made and the Applicants' attorneys was never contacted to discuss the possibility of postponement prior to the trial.
- [9] The only letter written to the Applicants' attorneys was dated 28 January 2014, and was written in response to the Applicants' attorney's letter of 23 January 2014. In the letter of 28 January 2014 the Respondent's attorneys stated that they were awaiting the Applicants acceptance or rejection of the 'with

prejudice' offer made in May 2013. No mention was made in this letter of the fact that the Respondent would be seeking a postponement. A letter was subsequently and on 31 January 2014 addressed to the Judge President of this Court in respect of a postponement. I have to say that it is unusual to approach the Judge President for a postponement the Friday before the Monday the matter is to go on trial, especially where no effort was made to approach the Applicants' attorneys for a postponement.

- [10] Be that as it may, the Respondent's attorney was not at Court, nor was any person from the Respondent present. The Respondent displayed an attitude that a postponement would be granted merely because it was asked for.
- [11] Ms Pather had a difficult and unenviable task to convince the Court that the Respondent should be granted the indulgence of a postponement if the only reason for postponement was that the Respondent did simply nothing to prepare for trial and was not ready to proceed.
- [12] Mr Baloyi for the Applicants opposed the application for postponement. He argued that the Applicants were dismissed in 2008 and this case was referred to Court in 2009 and that the Respondent has used all methods possible to frustrate the matter.
- [13] Mr Baloyi gave a brief background of the matter and emphasized that the Respondent has frustrated this matter from the onset. He submitted that at conciliation on 11 April 2008 the Respondent raised a point *in limine* that the CCMA had no jurisdiction to conciliate a dispute regarding retrenchment. The CCMA commissioner issued a ruling that the CCMA has jurisdiction to conciliate the dispute and issued a certificate of outcome. The Respondent subsequently took the ruling on review and brought an urgent application interdicting the Applicants from enrolling this matter, pending the outcome of the review application, which order was granted on 5 March 2010. On 14 May 2010 the Respondent withdrew the review and urgent applications.
- [14] On 30 March 2011 this Court granted a default judgment in favour of the Applicants. The Respondent filed a rescission application and on 21 April 2011 the default order was rescinded. On 17 May 2011 the Applicants filed a notice of intention to amend and after the Respondent filed no objection, the

amendments were effected. Only after the expiry of the *dies* the Respondent filed an objection to the amendment. This resulted in another application to this Court seeking condonation for the late filing of the objection. The Respondent filed a plea to the amended statement of case in June 2011, where after Mr Baloyi attempted to finalise the pre-trial minute. After numerous unsuccessful attempts, the Applicants enrolled the matter for a pre-trial before a judge and on 6 June 2012 the pre-trial minute was filed. Mr Baloyi argued that the Respondent did everything it could to frustrate the Applicants' case and this application for a postponement was simply a continuation of the same conduct.

[15] Mr Baloyi conceded that there was an attempt to settle the matter, but it was not settled. On 23 January 2014 he addressed a letter to the Respondent's attorneys and requested the discovery of the Respondent's documents, as per the pre-trial minute. Another letter was sent on 31 January 2014 stating that no bundle of documents was made available and that there is no settlement wherefore the matter should proceed to trial. The Respondent's attorneys seeking a postponement never approached him and the first time the issue of postponement was raised with him, was at Court when the trial was to commence.

[16] Mr Baloyi argued that the matter had been dragging on for a long time. The Applicants are laypersons who are unemployed and who had to come to Court every time the Respondent filed an application of some sort. He argued that a cost order would not remedy the situation as the Applicants are severely prejudiced by the long delay and the matter should proceed.

[17] After I considered the merits of the application for postponement and the submissions of the Applicants, I found that the application was without merit and that it would not be in the interest of justice to postpone the matter. The Applicants were dismissed six years ago and the matter had been dragging on since 2009.

[18] Justice delayed is justice denied and I refused the application for postponement and ordered that the matter proceed on the merits. At this point Ms Pather formally withdrew from the matter as she was only briefed to argue the application for postponement and not for trial.

Issues the Court is required to determine

- [19] In the pre-trial minute the parties agreed that the Court is to determine whether the Applicants' dismissals were automatically unfair, alternatively whether their dismissals were substantively and procedurally fair, and what relief they would be entitled to.

The pleadings and pre-trial minute

- [20] The Applicants' case is that they were unfairly dismissed after they joined a trade union and the Respondent wanted to avoid dealing with a trade union in the workplace and there was no real reason to retrench the Applicants. In this respect the Applicants' claim is that they were automatically unfairly dismissed.
- [21] In the alternative the Applicants' claim is that their dismissal based operational requirements was substantively and procedurally fair in that they were not consulted on the material aspects prescribed by section 189 of the Labour Relations Act (the Act) and the Respondent did not disclose the reason for the dismissal. In this respect the Applicants' claim is that they were substantively and procedurally unfairly dismissed.
- [22] In the pre-trial minute it was agreed as common cause between the parties that the Respondent formerly employed Applicants as packers, driver, machine operators and production managers. On 15 February 2008 the Respondent distributed a letter amongst the 14 individual Applicants titled 'Notice of Retrenchment in terms of section 213 of the Labour Relations Act'. According to the letter the effective date of termination was 29 February 2008 and the Applicants were relieved of their duties as from 15 February 2008.

The evidence adduced

- [23] Mr Mabowe Edmond Phakoago testified that the Respondent employed him as a production manager. On 31 January 2008 the workers found out that their annual salary increase was only 10% and much different from the salary increase of 15% they received in 2007. The workers were dissatisfied and they elected representatives to speak to Mr Makwela, the owner of the business and they requested a meeting with Mr Makwela.

- [24] The meeting the employees requested was scheduled for 8 February 2008 and on that date they asked Mr Makwela why there was a difference in the salary increases they received in 2007 and 2008. Mr Makwela said that the Respondent lost a tender but he did not give them any details about the tender he lost.
- [25] The employees requested Mr Makwela to increase their remuneration but he responded by saying he would rather die than paying them more and that he was seeking advice on how to retrench them. Nothing was further discussed about the retrenchment but the employees became scared and they went to the South African Chemical Workers Union ('the union') to seek advice.
- [26] The employees, including the applicants, joined the union on 12 February 2008. On 14 February 2008 the union sent a notice in terms of section 21(1) of the Act to the Respondent, informing the Respondent who the individuals were who joined the union and requesting a meeting on 19 February 2008 to conclude a collective agreement in respect of organisational rights. The name list of the employees who joined the union consisted of 36 individuals. Mr Phakoago testified that his name was omitted from the list but it was an oversight from the union's side as he also joined the union.
- [27] On 15 February 2008 and at around 13:00 the Applicants were called to the change room where they were handed letters of retrenchment. Mr Phakoago confirmed that only the employees who were retrenched received the letter of retrenchment. The letter stated that the effective date of termination would be 29 February 2014.
- [28] In paragraph 7 of the letter it was stated that consultations with all staff that might be affected by the proposed retrenchments were held since 8 February 2008. Mr Phakoago denied that consultations were held prior to receiving the letter of retrenchment on 15 February 2008. He testified that the only meeting that took place prior to receiving the letter of retrenchment on 15 February 2008, was the meeting workers requested with Mr Makwela on 8 February 2008. He testified that nothing about retrenchment was discussed on 8 February 2008, Makwela did not say which contract was lost, which positions would be affected and how it affected the business in general.

- [29] In paragraph 15 of the letter it is stated that should the position of the Respondent change within a period of twelve months, the Applicants would be the first in line for job opportunities in the same or similar fields to the positions they previously held. Mr Phakoago referred to a name list of individuals employed by the Respondent after the Applicants' dismissal and testified that there were 36 new employees appointed in positions that are the same or similar to the positions the Applicants previously held. The Applicants were not considered for appointment, as per paragraph 15 of the retrenchment letter.
- [30] Mr Phakoago was of the view that the Applicants were retrenched on 15 February 2008 because they joined the union on 12 February 2008. He however conceded that 37 persons joined the union and of those only 14 were retrenched and that the Respondent did not retrench every person who joined the union. The Respondent said that they were retrenched because it lost a tender.
- [31] He testified that the Applicants are seeking re-instatement and that the Respondent has a lot of work to do.
- [32] Ms Valencia Thokozile Hlatshwayo testified that the Respondent employed her and on 15 February 2008 she received a letter titled 'Notice of Retrenchment in terms of section 213 of the Labour Relations Act'. Others also received a similar letter, which was handed to them by Mr Makwela. She testified that approximately 18 persons were retrenched and of those 14 belonged to the union. The others who were retrenched, did not belong to the union and the union members who were not retrenched, remained members of the union.
- [33] She confirmed that no meeting was held regarding the retrenchment prior to the letter she received on 15 February 2008 and no other document was handed to them, apart from the letter of 15 February 2008.
- [34] Ms Hlatshwayo testified that the Applicants were seeking re-instatement.

Analysis of the evidence adduced

- [35] Dismissal is not in dispute wherefore the Respondent has the onus to prove the fairness of the Applicants' dismissal. The Respondent however was not present and called no witnesses and placed no version before this Court.

[36] After due consideration of the pleadings and the testimony adduced, I accept the following:

- i. The Applicants were retrenched after they received a notice of retrenchment on 15 February 2008;
- ii. The Respondent did not follow a process that complied with the provisions of section 189 of the Act;
- iii. There was no written invitation to consult and consultation process to consult on the issues as prescribed by the provisions of section 189(3) of the Act;
- iv. The Applicants were not afforded an opportunity to make representations;
- v. The reason the Respondent provided for the retrenchment was the fact that it lost a tender. No detail about the tender was disclosed and no other information as contemplated in section 189(3) of the Act had been disclosed. The Applicants were not informed what the tender was and how and to what extent it affected the business of the Respondent.
- vi. There is no nexus between the retrenchment and the fact that the Applicants joined a trade union. The timing of joining the trade union and retrenchment is merely a coincidence and not the reason behind the retrenchment. If that was the case, all union members would have been dismissed and that was not what happened.
- vii. The Applicants are seeking retrospective re-instatement.

Closing arguments

[37] In closing argument Mr Baloyi on behalf of the Applicants conceded that the evidence did not support a claim for automatically unfair dismissal for reasons related to joining the union. That portion of the Applicants' claim was abandoned.

[38] Mr Baloyi argued that section 189 of the Act was not considered at all, there was no notice issued in terms of the provisions of section 189(3) of the Act and no fair procedure was followed. No selection criteria had been used and

there is simply no indication of how employees were selected for retrenchment. There was no indication which contract was lost, which positions would be affected and there was no fair reason that existed before the retrenchments were finalised.

- [39] Mr Baloyi submitted that the Applicants would be seeking an order declaring their dismissal substantively and procedurally unfair and to be re-instated retrospectively. The issue of costs was left for the Court's discretion.

The issues this Court has to decide:

- [40] I have to decide whether the Applicants' dismissals were procedurally and substantively fair.
- [41] In view of the fact that no process was followed prior to the issuing of the retrenchment letters on 15 February 2008 and no attempt was made to comply with the provisions of section 189 of the Act, I cannot but find the Applicants' dismissals procedurally unfair.
- [42] The issue that remains to be decided is whether the Applicants' dismissals were substantively fair.
- [43] The Respondent told the Applicants that it had to retrench the Applicants as it lost a tender. The Respondent never provided them with any detail of the tender that was so lost and never disclosed information on how that loss of the tender affected the business.
- [44] The Applicants' case is that there was no need to retrench them as the Respondent's business carried on as usual and other persons were employed in the same or similar positions they occupied before they were retrenched.
- [45] The only reason for retrenchment was the loss of a tender. There was no evidence of the Respondent's financial position before this Court, nor was there any proof of the contract or tender that the Respondent lost. There was no evidence before this Court to convince me that the Respondent's financial position was such that it had to resort to the retrenchment of the Applicants and that their retrenchment in any way assisted to salvage the Respondent's financial position.

[46] I therefore find the dismissal of the Applicants substantively unfair.

[47] The Applicants stated that the relief they seek is retrospective re-instatement. I can see no reason why the Applicants should not be awarded the relief they seek.

Costs

[48] Costs should be considered against the provisions of section 162 of the Act and according to the requirements of the law and fairness.

[49] The requirement of law has been interpreted to mean that the costs would follow the result.

[50] In considering fairness, this Court has held that the conduct of the parties should be taken into account and that *mala fide*, unreasonableness and frivolousness are factors justifying the imposition of a costs order. Another factor to be considered is whether there is an ongoing relationship that would survive after the dispute had been resolved by the Court. If so, a costs order may damage the ongoing relationship.

[51] The general accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation.

[52] I take into consideration that the Applicants were represented on a pro bono basis and that they had not incurred an expense in that regard. I also considered the fact that the Applicants are re-instated and that being so would constitute an ongoing relationship a cost order may damage.

[53] In the premises, I make the following order:

Order

1. The Applicants' dismissals were procedurally and substantively unfair;
2. The Respondent is to re-instate the Applicants retrospectively with effect from the date of their dismissal; without loss of benefits.
3. No order as to costs.

Prinsloo, AJ

Acting Judge of the Labour Court

LABOUR COURT

Appearances:

For the Applicant: Mr Baloyi of Baloyi Attorneys

LABOUR COURT