



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 20/2013

In the matter between:

JONA MABUSO MACUVELE

Applicant

and

KENSINGTON RIDGE PRIMARY SCHOOL

Respondent

Heard: 27 February 2014

Delivered: 04 March 2014

Summary: Applicant alleges that his retrenchment was procedurally and substantively unfair. There were sound operational reasons to retrench. The Respondent failed to comply with provisions of section 189(3) of the Labour Relations Act. Dismissal was substantively fair and procedurally unfair.

JUDGMENT

PRINSLOO, AJ

Introduction

- [1] The Applicant approached this Court for relief as he claims that his dismissal was substantively and procedurally unfair.
- [2] The Respondent opposed the matter.

- [3] Prior to commencement of the trial, the Applicant sought a postponement. After considering the submissions made by the parties, the request for postponement was denied and the trial proceeded.

The pleadings and pre-trial minute

- [4] In his statement of case the Applicant claimed that he was dismissed on 7 December 2012 and that he was not consulted before the decision to dismiss him was taken. He claims that his dismissal was substantively and procedurally unfair. Apart from stating that he was not consulted before he was dismissed, the Applicant provided no details of the alleged procedural and substantive unfairness in his statement of case.
- [5] In its statement of defence the Respondent stated that the Applicant was retrenched due to operational reasons and that he was paid a retrenchment package. The Respondent further pleaded that a meeting was held with all staff on 26 November 2012 and everybody was informed about the Respondent's financial constraints and the shortfalls and were made aware of the possibility of retrenchment. A further meeting was held with the Applicant and due to the fact that no alternatives could be identified and because the position occupied by the Applicant was not sustainable and essential for the operations of the Respondent, he was retrenched.
- [6] In the pre-trial minute the parties agreed that the Applicant's service was terminated on 7 December 2012. It was disputed that meetings took place and that the Applicant was consulted prior to his retrenchment. The financial hardship of the Respondent was disputed as the reason for the retrenchment.
- [7] The relief sought by the Applicant is maximum compensation.

The evidence adduced

The Respondent's testimony

- [8] Ms Jameson testified on behalf of the Respondent (the school). She explained that 580 learners are enrolled at the school. They are predominantly from poor areas and only 25% of the learners pay school fees. The ability of the learners to pay school fees has a direct impact on the financial position of the school. In 2012 the school granted exemption of school fees to the value of R 950 000

and in 2013 the exemptions were to the value of R 1 140 000. The school can submit claims to the Department of Education in respect of exempted school fees and in 2013 the Department paid only R 34 000 to the school in respect of the exempted fees of R 1 140 000. The school experienced a serious financial shortfall as its income for 2012 was R 1 609 121 and expenses R 1 788 395 and in 2013 the income was R 1 678 994 and the expenses were R 1 744 936.

- [9] Towards the end of 2012 it became evident that the Respondent has to cut costs. On 26 November 2012 a meeting was held and all employees attended, including the Applicant. The chairperson of the school governing body (SGB) informed employees that the school experienced a financial shortfall and that fundraising and cost cutting measures were very important. Employees were asked to make proposals to cut costs. Fundraising was a priority for the Respondent. Ultimately the employees were informed that there is a need to retrench the employees who are paid from the school governing body's funds.
- [10] The Applicant made no proposals or alternative suggestions.
- [11] The Respondent retrenched five employees and individual meetings were held with each of them and their retrenchment packages were discussed.
- [12] The package the Applicant was paid included severance pay of 14 weeks, as he worked for the Respondent for a period of 14 years, his salary for December 2012, one month's notice, a bonus and an additional amount of R 5000. The money was paid to the Applicant via an electronic fund transfer to his bank account and R 2000 was paid to him in cash.
- [13] Ms Jameson explained that the Applicant's job at the school was minor maintenance, repairs and painting and no one else held a similar position. The Applicant was selected for retrenchment, as it was not necessary to employ a person on a full time basis to do maintenance, repairs and painting. The parents and sponsors could assist with the tasks performed by the Applicant.
- [14] The Applicant was retrenched at the end of 2012 and so were four other employees paid by the SGB.

[15] The Applicant cross-examined Ms Jameson and he asked her why he was retrenched as other individuals paid by the SGB are still employed at the school. Ms Jameson responded that the school retrenched five employees in 2012 and the ones paid by the SGB and who are still employed, perform other functions and are still needed.

[16] Mr Macuvele put it to Ms Jameson that he was paid too little and he was complaining about the amount of money he was paid, given the number of years he worked for the school. Ms Jameson explained that he was paid 14 weeks severance pay for the 14 years he worked and he was paid one month's notice pay, which he was not required to work.

The Applicants' testimony

[17] The Applicant, Mr Macuvele, testified that he worked for the school for 14 years and he was not happy about the pay he received and that he was given one day's notice of his retrenchment. Ms Jameson explained that he was told on 7 December 2012 that he was retrenched and the school closed the next day. He was however aware of the retrenchment before that date. The Applicant was paid his full salary for December 2012 and he was paid another month's notice pay.

[18] Mr Macuvele testified that he was retrenched because the Respondent did not like him and because he asked questions about his salary. This version was never put to Ms Jameson and was also not the Applicant's case in his statement of case.

[19] In cross-examination the Applicant admitted that a meeting was held in November 2012 but denied that the financial shortfall was discussed.

[20] Mr Macuvele said that the relief he seeks from the Court is to increase his retrenchment package as he was not satisfied with the package he received.

Analysis of the evidence adduced

[21] After due consideration of the pleadings and the testimony adduced, I accept the following as common cause:

- i. The Respondent experienced financial difficulties in 2012 and 2013 and suffered substantial financial short falls;
- ii. A meeting was held on 26 November 2012, which meeting the Applicant attended, and the financial difficulties of the Respondent and the need to retrench had been discussed at this meeting;
- iii. The Applicant was not issued with the required notice of anticipated retrenchment as provided for in section 189(3) of the Labour Relations Act;
- iv. The Applicant was paid severance pay of 14 weeks, as he worked for the Respondent for a period of 14 years, his salary for December 2012, one month's notice pay, a bonus and an additional amount of R 5000.

Closing arguments

- [22] In closing argument Mr Spiller on behalf of the Respondent submitted that the evidence shows that the Respondent was in serious financial difficulty and the financial state of the Respondent was not disputed or challenged. Mr Spiller submitted that this Court should accept that there was a clear economic objective and need to and retrench. The retrenchment was substantively fair.
- [23] In respect of the procedure Mr Spiller conceded that the Respondent did not follow the process as prescribed by the Labour Relations Act to the letter. However, the Applicant was present at the meeting where the shortfall was explained and he was asked for proposal to eliminate the shortfall, but made no proposals. Although the 'boxes' cannot be ticked, the Respondent made an attempt to consult with the Applicant and to put measures in place to avoid retrenchment. The Respondent is a public school that is already cash strapped and is not a big organisation with unlimited funds and access to external advisors and consultants. The Respondent deviated from the provisions of the Labour Relations Act, but such deviation is understandable.
- [24] Mr Spiller argued that the severance package that was paid to the Applicant exceeded the minimum that is prescribed by the provisions of the Basic Conditions of Employment Act. The school is still in a financial vulnerable position and it tried to engage the Applicant and his former attorneys on a

number of occasions to resolve the matter, but was met with nothing but an obstructive and uncooperative attitude.

[25] Mr Spiller submitted that the Applicant's dismissal was substantively fair and in respect of the procedural non-compliance, compensation should be awarded, but the relevant circumstances dictate that the amount of compensation should be low.

[26] Mr Macuvele stated that he worked for the school for 14 years and after so many years the money he received was too little. He cannot maintain his children with the little money he was paid. He emphasized that he was not satisfied with the money he was paid.

The issues this Court has to decide:

[27] The Court is to determine whether the Respondent had any operational requirements that required and justified the dismissal of the Applicant and whether a fair procedure was followed.

The Respondent's operational requirements:

[28] Was there a need to restructure and to retrench?

[29] Ms Jameson testified about the financial difficulties the Respondent experienced in 2012 and 2013 and the financial shortfalls were presented in her evidence. She testified that a total number of five persons were retrenched in 2012. Ms Jameson's evidence in this regard was not disputed.

[30] The Applicant did not in his own testimony before this Court dispute the Respondent's poor financial position nor was the Respondent's testimony in this regard disputed. The Applicant did not dispute the evidence adduced in respect of the financial shortfalls and the fact that the Respondent suffered losses in 2012 and 2013.

[31] In the pleadings and pre-trial minute the Applicant disputed the need to retrench and disputed that financial hardship was the real reason for his dismissal.

[32] However, during the trial the Applicant did not challenge the Respondent's financial position and did not adduce any evidence to rebut the Respondent's case that it suffered financially and had to retrench.

[33] I accept that the Respondent experienced financial difficulties in 2012 and 2013 and that it had an operational need to retrench staff.

[34] There was sufficient evidence before this Court to convince me that the Respondent's operational requirements justified the dismissal of the Applicant.

Was a fair procedure followed:

[35] It was common cause that a meeting was held on 26 November 2012 and it is the Respondent's case that at this meeting the financial difficulties of the Respondent and the need to retrench had been discussed.

[36] In respect of the procedure Mr Spiller conceded that the Respondent did not follow the process as prescribed by the Labour Relations Act to the letter. However, the Applicant was present at the meeting where the shortfall was explained and he was asked for proposal to eliminate the shortfall, but made no proposals. Although the 'boxes' cannot be ticked, the Respondent made an attempt to consult with the Applicant and to put measures in place to avoid retrenchment.

[37] The Applicant in his testimony before this Court did not vigorously challenge the procedure followed by the Respondent and he did not in his own testimony address the procedural fairness of his dismissal.

[38] The evidence before me shows that the Applicant was present at a meeting where the financial difficulties of the Respondent and the need to retrench had been discussed. A follow up meeting was held with him and the Respondent's case is that there was an attempt to engage in a joint consensus seeking process, albeit not a perfect one.

[39] It is evident to me that the Applicant was not issued with a notice as contemplated in section 189(3) of the Labour Relations Act and that the process as prescribed by the Act was not followed. I am however not convinced on the evidence before me that no process was followed at all.

[40] The Respondent attempted to follow a process and insofar as the process followed did not comply with the provisions of the Act, it was unfair.

[41] The Applicant's dismissal was therefore procedurally unfair.

Conclusion

[42] In my observation the crux of the Applicant's case is that he feels that he should have been paid more than the minimum prescribed severance pay of one week's salary for each completed year of service. In the Applicant's mind he was entitled to more than the minimum as he worked for the Respondent for 14 years and he repeatedly expressed his dissatisfaction with the 'little money' he received after 14 years of service.

[43] The relief the Applicant seeks from this Court is that his severance package be increased.

[44] The truth is however that the Respondent paid the Applicant severance pay of 14 weeks for the 14 years he worked for the Respondent, his salary for December 2012, one month's notice pay, a bonus and an additional amount of R 5000. The Applicant was paid more than what he was in law entitled to.

[45] The Applicant was obstructive and difficult in all attempts the Respondent made to settle the matter with him and he persisted with his claim that this Court should increase his severance package.

[46] In law the Applicant is not entitled to more than one week's salary for each completed year of service and because he was already paid more than what the law requires, this Court cannot increase his severance package.

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

Order

1. The Applicant's dismissal was substantively fair;
2. The Applicant's dismissal was procedurally unfair insofar as section 189(3) of the Labour Relations Act was not complied with;

3. The Respondent is to compensate the Applicant in the amount equivalent to 3 months remuneration calculated at the rate of remuneration he received at the date of his dismissal;
4. No order as to costs.

Connie Prinsloo

Acting Judge of the Labour Court

Appearances:

For the Applicant: In person

For the Respondent: Advocate Spiller

Instructed by Gael Barrable Attorneys

LABOUR COURT