



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, IN JOHANNESBURG

JUDGMENT

Of interest to other Judges

Case no: J 728/14

In the matter between:

SESWANTSHO GODFREY LEBEYA

Applicant

and

MINISTER OF POLICE

First Respondent

NATIONAL COMMISSIONER OF THE

SOUTH AFRICAN POLICE SERVICE

Second Respondent

Heard: 28 March 2014

Delivered: 31 March 2014

Summary: (Urgent application-suspension of terminations pending further consultation under s 189 – urgent relief to suspend a retrenchment pending such consultation can be granted under certain circumstances)

JUDGMENT

Background

- [1] The applicant has come to court on an urgent basis to prevent his termination on grounds of redundancy before his employer, the South African Police Services ('SAPS'), terminates his employment of nearly 30 odd years, without consulting with him under section 189 of the Labour Relations Act 66 of 1995. In his application for relief he did not specifically refer to section 189 but it is patently clear from the factual context and from the Act that it could only be a reference to consultations under that provision.
- [2] Since 1 February 2011, the applicant has been serving as a Deputy National Police Commissioner at the South African police service head office.
- [3] At the end of August 2013, the National Commissioner (the second respondent) indicated her intention to restructure the corporate function of the SAPS. Part of this would entail a reduction in the number of Deputy National Commissioners. At about the same time she advised him that she wanted to appoint him as the head of the SAPS Research Institute, an entity which still had to be established. She further indicated that the new post would not be on the level of a Deputy National Commissioner. Despite the absence of any formal confirmation of these plans, no sooner had the Commissioner broached the subject with him, than she announced his transfer to the position to the media. Subsequent to the announcement, he received notification which referred to the media briefing on 31 August 2013 but described the step as an intended provisional appointment to the post at the level of Lieutenant-General, which is the post level he holds even though he is a Deputy National Commissioner.
- [4] In terms of the structure presented to the Parliamentary portfolio committee, the head of the new institute could not be a Lieutenant General. Nevertheless, on 17 February 2014, he was issued with a letter in which he was advised to accept the offer made to him of being allocated to the position of Head of South African Police Service Research Institute as a Lieutenant General at level 15. He was obliged to accept the offer by 17 March 2014. In the letter from the office of The Deputy National Commissioner: Corporate Service Management it was stated:

"1.1 You must unconditionally accept the offer made to you as offered by 17th of March 2014.

1.2 Failure to unconditionally accept the offer by the date mentioned in paragraph 1.1 above will mean the offer falls off.

1.3 The natural consequence of the offer being removed from the table is that you will be rendered redundant with the natural attendant consequence of such eventuality."

[5] The applicant responded on 17 March 2014. A considerable part of the letter is concerned with what the applicant perceives to be his implied demotion by the author of the letter. However, he concluded his letter with the following:

"12. I have through my evenly numbered letters dated 2013-10-29, 2013-11-12, 2013-11-13 and 2013-11-19, repeatedly indicated that I accept the post with my current rank which essentially means that the acceptance is neither promotion nor demotion, but lateral appointment as provided for in terms of regulation 44 (7) (c) of the South African Police Service Employment Regulations, 2008. I implore a frank and meticulous attention of the National Commissioner on this matter."

[6] The response of the National Commissioner, who appears to have signed the letter of reply under her official title, was swift and peremptory, viz:

"YOUR FAILURE TO ACCEPT THE OFFER MADE TO BUY 17 MARCH 2014

1. As demanded of you, you were required to accept the offer by 17th of March 2014.

2. 17 March came and is gone and you have not accepted the offer.

3. The natural consequence of your failure to accept the offer is that you have rendered yourself redundant.

4. The HR will now work on your exit-package.

5. You are hereby requested to protect office you are currently occupying by 2014-03-28.

6. Your cooperation is highly appreciated."

[7] At this juncture, it should be noted that the National Commissioner avoided using the word termination, or in any direct way stating that the applicant was

going to be dismissed by the SAPS. The National Commissioner's communication to all his colleagues in the SAPS was more emphatic in describing the consequence of the applicant allegedly not accepting the appointment, though the announcement might still be interpreted by an ordinary reader to mean that it was the applicant who decided to leave his employment:

"I wish to advise that Lieutenant General Godfrey Lebeya and Lieutenant General Leah Mofomme have opted not to accept the new roles identified for them and will leave the employ of the SAPS with effect from 31 March 2014."

- [8] In this roundabout and somewhat misleading manner, the termination of the applicant's services at the end of this month was heralded. In a letter from the applicant's attorneys on 24 March 2014, they queried how it could be 'a natural consequence' of his alleged failure to accept the post that he had rendered himself redundant. The letter also confirmed that, as far as he was concerned, he had accepted the appointment. Further, the letter queried the indirect suggestions that the applicant's services would be terminated at the end of the month. Although the receipt of the letter was confirmed, it appears that the National Commissioner did not consider it required any response. This lack of response prompted the applicant to launch this application after giving the Commissioner a final opportunity to respond by close of business on 26 March 2014. This ultimatum, did not elicit any response either and the applicant launched this application on 27 March 2014.
- [9] The respondents chose not to file any answering affidavits, nor to seek time to do so, but chose to argue on the applicant's papers.

Evaluation

Urgency

- [10] The respondents contended that there is nothing urgent about this matter as the parties had been in discussions since last year about the applicant's transfer to the new post. By implication, the applicant ought to have done something about insisting upon consultations sometime back. However, prior to him receiving the letter on 18 March 2014, there is nothing on the papers before me that tells me that the applicant was aware not only that he might

become redundant to the SAPS, but that his redundancy automatically would result in the termination of his service. The letter of 17 February 2014 spoke only of the consequences naturally attendant on redundancy. The natural consequence attendant on a redundancy situation in our law, is that the employer will enter into a consultation process with the affected employee or their representative following the procedures set out in section 189 of the Labour relations act 66 of 1995 before taking a final decision. Even though retrenchment may be contemplated by the employer under circumstances like the present one, the whole point of the process envisaged by the provision is to see if the parties cannot reach agreement on a less drastic measure, failing which they ought to try and agree on ameliorative measures to cushion the blow.

- [11] As far as urgency is concerned, on what is before me, I am satisfied that the probable intention of the National Commissioner's, namely to dismiss the applicant because he did not accept the transfer on exactly her terms only became manifest after her letter of 18 March 2014. Through his attorneys the applicant sought to clarify matters with the second respondent but to no avail. The launching of this application on 26 March 2014, satisfies the requirements of urgency in my view.

Existence of a right

- [12] In this instance, the existence of a right is intimately tied up with the question whether an alternative remedy exists. We are not dealing with a *prima facie* right, but whether in these circumstances, the applicant is clearly entitled to have his termination suspended pending the employer holding consultations with him under s 189.
- [13] The principal contention of the respondents is that the law does not permit an employee to obtain relief in circumstances where a procedurally unfair retrenchment is the issue. The applicant's remedy so it was argued is to refer an unfair retrenchment claim to conciliation and subsequent adjudication or arbitration under the provisions of the LRA. In argument, the respondents contended that they had an election either to transfer, demote or dismiss the applicant. Effectively, they had chosen the last course of action and are

prepared to defend any unfair retrenchment claim brought by the applicant as a result of that choice. The respondent contended that the authorities made it clear that the Labour Court should not entertain unfair dismissal claims brought under the guise of interdict proceedings.

[14] It is true that, for the most part, the Labour Court will not interfere in incomplete proceedings that may result in dismissal, except in exceptional circumstances.¹

Similarly, if the employee's services have already been terminated, the Labour Court only acquires jurisdiction to deal with the *unfairness* of that dismissal if the matter is referred to it in terms of section 191 of the LRA.² The Labour Court has been willing to grant interdictory relief in certain circumstances even where notice of dismissal has been given but where the consultation process is fundamentally flawed.³

¹ See **Booyesen v Minister of Safety and Security and others** [2011] 1 BLLR 83 (LAC) at para [34].

² See **M A De Beer v Minister of Safety and Security and others** [2013] 10 BLLR 953 (LAC) at 962-3:

"[23] In terms of section 158(1)(a)(i) of the Act, the Labour Court is empowered to, inter alia, grant a litigant appropriate urgent interim relief. On the other hand, the Labour Court is not empowered, for example, to adjudicate a dispute about the fairness of a dismissal in circumstances where the dispute was not first referred to the CCMA, or the relevant council, as the case may be, for conciliation within the prescribed period.

Section 191(1) of the Act requires that such a dispute be first referred to conciliation. It is only after the council or the Commissioner had certified that the dispute remains unresolved, or a period of 30 days has expired since the council or the CCMA received the referral and the dispute remains unresolved that the council, or the CCMA, must arbitrate the dispute (section 191(5)(a)), or the employee may refer the dispute to the Labour Court for adjudication (section 191(5)(b)). It is thus clear from section 191(5) that the referral of a dismissal dispute to conciliation is a pre-condition before such a dispute can be arbitrated, or referred to the Labour Court for adjudication. In the absence of a referral to conciliation, or if it was referred, but there is no certificate issued as contemplated in section 191(5) and the 30-day period has not expired, the Labour Court has no jurisdiction to adjudicate the dismissal dispute."

³ For example, in **National Union of Metalworkers of SA & others v Comark Holdings (Pty) Ltd** (1997) 18 ILJ 516 (LC), where the decision to retrench had been taken prior to the conclusion of consultations and interdict proceedings were launched after employees had been notified of their retrenchment but while they were still employed. See also **Vela & others v Savo & others** (1998) 19 ILJ 916 (LC) where an interdict was granted preventing the retrenchment of employees until consultations had taken place under s 189, but was not confirmed on the return day in view of a tender not to retrench employees until consultations had been completed. In **National Union of Metalworkers of SA v Nissan SA Manufacturing (Pty) Ltd** (1999) 20 ILJ 1097 (LC), the court interdicted retrenchments pending the determination of a dispute over the provision of information under a collective agreement, where the union might have been detrimentally affected in the consultation process without the information in question. In **National Union Of Metalworkers Of Sa & Others v Dzima Manufacturing (PTY) Ltd** (1999) 20 ILJ 2904 (LC) the court granted interim relief requiring the employer to extend the affected employees employment pending s 189 consultations, even though they had been notified of their retrenchment. In **National Education Health & Allied Workers Union v Medicor (Pty) Ltd t/a Vergelegen Medi Clinic** (2001) 22 ILJ 1839 (LC) the court declined final relief on the basis that since the employees had already been notified of their termination on grounds of retrenchment they had to be considered dismissed and therefore not entitled to interim relief. Secondly, the court held at [20] and [21] that interim relief should be declined

- [15] In this instance, the applicant argues that his services have not yet been terminated as he remains in employment until the end of the month, even if he has been told, unceremoniously, to leave his office. Be that as it may, he has effectively been told he will be dismissed at the end of the month and a decision to end them has been taken by the respondents. The applicant seeks to assert a right to require the employer to fulfil its obligations in terms of section 189 of the LRA before it gives effect to his dismissal for operational reasons on account of his redundancy.
- [16] It is clear that a subsequent finding that his retrenchment was procedurally unfair will not restore the opportunity for him to engage in a joint problem solving process right. The right to engage in a joint problem solving process prior to a retrenchment is one of those evanescent entitlements which are not adequately restored by compensation. The main value of consultation under s 189 is the opportunity to influence the outcome. That cannot meaningfully be done in an unfair retrenchment hearing some time after the event. By contrast, procedural unfairness in other types of dismissal to a large extent is restored by the statutory arbitration process itself as the hearing is a *de novo* one. The fundamental purpose of s 189 can be thwarted if an employer can simply 'elect' to ignore it even when it can still be complied with.
- [17] It is true, after his termination the applicant could complain that he was retrenched in a procedurally unfair manner. The procedural fairness of his retrenchment will to some extent be measured against the requirements of section 189, though that will not necessarily be determinative of the issue. If the applicant subsequently does proceed to challenge his retrenchment and succeeds only in establishing that it is procedurally unfair, he will not regain an

because if the employees subsequently were found to have been unfairly dismissed they could be reinstated and if the employer wanted to continue with the retrenchment the opportunity to consult would arise again. It seems in arriving at this conclusion, the court was not asked to consider the possibility that if the retrenchments were only found to be procedurally unfair subsequently, then there would not be another opportunity to consult since only compensation might be payable.

opportunity to explore what alternatives that process might have yielded. He will be confined to payment of compensation as relief.

[18] In this instance, there is no evidence that between the time of contemplating the applicant's termination and taking the decision to do so, he was advised that the termination of his services for operational reasons was being contemplated and consequently was invited to consult with his employer in terms of section 189.

[19] On the evidence, there appears to have been a complete failure to invoke a consultation process as envisaged by s 189. I am satisfied that the applicant has a clear right not to be denied the opportunity to engage with his employer in consultations as required under s 189 in circumstances where it is still possible to give effect to the right, as the employee has not already left his employment and suspending his dismissal is still possible.

Order

[20] The respondents are ordered to suspend the applicant's termination pending consultations with him over his possible retrenchment in accordance with the provisions of s 189 of the Labour Relations Act, 66 of 1995.

[21] The respondents are jointly and severally liable for the applicant's costs the one paying the other to be absolved.



R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Advocate E. van As

Instructed by: VDT Attorneys

For the Respondents: Advocate A.P. Laka SC

Instructed by: The State Attorney Pretoria