



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J918/2008

**NATIONAL UNION OF METALWORKERS OF SOUTH
AFRICA obo J MDLULI AND 8 OTHERS**

Applicants

and

CUSTOM HARNESS MANUFACTURER

Respondent

Heard: 28 May 2015

Delivered: 29 May 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] The dispute brought before the court by way of a statement of claim pertains to whether the dismissal of the individual applicants was automatically unfair

as contemplated in section 187 (1) (g) of the Labour Relations Act¹. The individual applicants seek retrospective reinstatement, or in the alternative, compensation.

- [2] At trial, the applicants had led the evidence of two witnesses, after which Adv Beaton SC on behalf of the respondent had made an application for absolution from the instance.

Background and common cause facts:

- [3] The applicants were initially employed by an entity known as Allprod (Pty) Ltd ("Allprod") until their dismissal on 31 March 2007. Upon their dismissals they were paid a severance package calculated at one week per year of service. A dispute pertaining to unfair dismissal on account of operational requirements was referred to MIBCO in April 2007 and could not be resolve at a conciliation hearing held on 23 May 2007.
- [4] The general nature of the individual applicants' work was to make an electrical wire connections and harnesses that would be used in the auto electrical systems of motor vehicles. It was further common cause that the general sequence of their work was to first cut the wires, crimp and roll them, then thereafter process them into harnesses that would then be injected with silicone. At the end of that process the work will be quality assured.
- [5] In their initial statement of claim, the applicants had disputed the procedural and substantive fairness of the retrenchments. On 27 November 2013, they had filed an amended statement of case contending that their dismissals were automatically unfair, on the basis that they were dismissed as a result of a transfer of the business of Allprod to the new employer, Custom Harness Manufacturer CC
- [6] In the parties signed pre-trial minutes, the applicants alleged that;

6.1 The business of Allprod (Pty) Ltd was transferred as a going concern to the respondent;

¹ 66 of 1995 as amended

- 6.2 They were offered a fixed term contract on 30 March 2007 by a Mr. Bradish their manager at Allprod, which contract was for a fixed period of three months.
- 6.3 The work that was performed by the applicants at Allprod is still being performed by other employees of the respondent that have been employed or transferred in the applicants' stead;
- 6.4 The work that was performed by the applicants is still being performed by their replacements at the new site of the factory in Silverton;
- 6.5 Those employees of Allprod that agreed to sign the fixed terms contract are still employed by Custom Agencies and are still carrying out the same and/or similar duties that they carried out while employed by Allprod.
- 6.6 The senior managers that the applicants had daily contact with while employed at Allprod, viz, Marius Van Wyk, Simon Bradish and Dirk Kunz, if not actual directors of the same respondent were employed by the Allprod in the same or similar capacities.

The applicable legal principles in respect of applications for absolution from the instance:

- [7] The jurisdiction of this Court to grant absolution in appropriate circumstances is derived from the provisions of section 151(2) of the Labour Relations Act which provides that;

'The Labour Court is a superior court that has authority, inherent power and standing, in relation to matters under its jurisdiction, equal to that which a court of a provincial division of the Supreme Court has in relation to matters under its jurisdiction'.

- [8] The test to be applied by the Court in considering such applications is whether there is sufficient evidence upon which a reasonable person could find for the applicant or, as it has also been expressed, the question is whether there is such evidence, assuming it to be true, upon which a reasonable Court might,

not should, give judgment against the respondent². In *Minister of Safety and Security v Madisha and Others*³ this Court per Basson J summarised the principles within the context of civil law as follows;

‘It is trite in civil law that a (civil) court may grant absolution from the instance in appropriate circumstances. Very briefly, this means that evidence is insufficient for a finding to be made against the defendant (in a civil trial). Absolution from the instance may thus be granted at the close of the plaintiff’s case when it appears that there is no evidence to support the plaintiff’s claim or if there is insufficient evidence upon which a court, acting reasonably might find for the plaintiff. The court is then entitled to ‘absolve the defendant from the instance’. The effect of such a decision is to bring to an end the proceedings. The test to be applied in deciding whether or not absolution should be granted has been set out by the Appellate Division in *Claude Neon Lights (SA) v Daniel* 1976 4 SA 403 (A):

‘... [W]hen absolution from the instance is sought at the close of the plaintiff’s case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff’.

Automatically unfair dismissals:

[9] In terms of Section 187(1), a dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5, or if the reason for the dismissal is-

‘(g) a transfer, or a reason related to a transfer, contemplated in section 197 or 197A’

[10] Central to the question whether the individual applicants’ dismissal constituted an automatically unfair dismissal because they were not transferred to Custom Agencies when Allprod was allegedly transferred, is whether the business of the latter was transferred as a going concern for the purposes of section 197 of the LRA. The primary purpose of section 197 is to safeguard the rights of employees when there is a transfer of business as a going concern and the

² See *Zefferdt et al: The South African Law of Evidence* at page 164 – 165 and the authorities referred to.

³ (2009) 30 ILJ 591 (LC) at para 19.

business changes hands⁴. The pertinent subsections of Section 197 read as follows:

- '(1) In this section and in section 197A
 - (a) 'business' includes the whole or a part of any business, trade, undertaking or service; and
 - (b) 'transfer' means the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern.
- (2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6) –
 - (a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;
 - (b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;

[11] The question that arises at this point therefore, is whether the applicants have led sufficient evidence upon which this Court, applying its mind reasonably to that evidence, could or might find for them in the case that they have presented. In order to establish automatically unfair dismissal, the applicants first have to establish that a dismissal did take place, and once a dismissal is established, the question is whether it was automatically unfair.

[12] In this case, it was common cause that the individual applicants' services were terminated by Allprod. As to whether that dismissal is automatically unfair as contemplated in section 187 (1) (g) on account of the operation of section 197 is determined by asking the question whether there (a) a transfer; (b) of a business (or part of a business, or a service); and (c) as a going concern.

⁴ *Horn and Others v LA Health Medical Scheme and Another* [2015] ZACC 13 at para [59]

[13] The test for determining whether a business was transferred as a going concern was laid down in *Nehawu vs University of Cape Town and Others*,⁵ where the Constitutional Court emphasised that:

“In deciding whether a business has been transferred as a going concern regard must be had to the substance and not the form of the transaction. A number of factors will be relevant to the question whether a transfer of a business as a going concern has occurred, such as the transfer or otherwise of assets both tangible and intangible, whether the workers are taken over by the new employer, whether customers are and whether or not the same business is being carried on by the new employer. What must be stressed is that this list of factors is not exhaustive and that none of them is decisive individually”⁶

The evidence:

[14] Ms Josephine Mdluli’s testimony on behalf of the applicants was as follows;

- 14.1 She was initially employed by Allprod with effect from October 1999. Her position was that of an Assembler, which essentially entailed cutting, and assembling of wiring (harnesses), and connecting these to connectors.
- 14.2 Custom Agencies had moved to the premises of Allprod on a date she could not recall, and it was also involved in the business of connecting wires even though the harnesses it manufactured were different from those of Allprod. She testified that Custom Agencies’ production process was similar to that of Allprod as it involved the cutting, crimping and rolling of wires. Custom Agencies’ also used the same or similar machines as operated by Allprod.
- 14.3 The management team of Allprod included Marius Van Wyk, Simon Bradish and Dirk Kunz.

⁵ 2003 (3) SA 1 (CC) See also *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and Others* (CCT133/14) [2015] ZACC 8 (20 April 2015) at para [36]

⁶ At para 56

- 14.4 On 28 February 2007, Bradish had issued the employees with notices from Allprod informing them that it was going to close down on 31 March 2007.
- 14.5 Towards the end of March 2007, the employees were individually handed copies of fixed term contracts which they were required to sign. The contracts were for a fixed period of three months, and were to be entered into with Custom Agencies. The employees were further informed that if they did not sign the contracts, they would be without employment and would not be permitted to enter the premises.
- 14.6 She and other employees did not sign the contract and were prohibited from reporting for duty.
- 14.7 The cause of their dismissal was that they had refused to sign the fixed term contract with Custom Agencies.
- 14.8 Under cross-examination, Mdluli could not state who Allprod's biggest customers were. She however testified that Netstar was one of the clients for whom Allprod had assembled wires between August 2006 and March 2007.
- 14.9 Mdluli further under cross-examination testified that she did not know what the end products produced by Allprod were, and further contended that she did not know what its relationship was with other companies. She conceded that the employees were informed that Allprod was going to close down as it was 'short of money', but however denied that they were ever told that its contract with Netstar had been terminated.
- 14.10 Mdluli could not respond when it was put to her that Custom Agencies also supplied wiring to refrigeration industries and also made tow bars. She however conceded that she in particular had nothing to do with the manufacturing of harnesses for Quantum vehicles.

14.11 Mdluli further denied when it was put to her that when told to sign the fixed term contracts, they were also told that the periods of the contracts may be assessed. She however conceded the other employees who had signed those contracts had continued their employment with Custom Agencies beyond three months, and that had she done so also, she would still have been employed by Custom Agencies.

14.12 She conceded when it was put to her that Allprod produced automotive tracking devices, whilst Custom Agencies did not do so in 2007. Under re-examination however, she testified that the harnesses she assembled were not those as assembled by Custom Agencies even though the employees of the two entities helped each other.

[15] Ms. Salome Mokoena's testimony on behalf of the applicants was as follows;

15.1 She was also employed by Allprod from 1995 and was responsible for cutting of wires with the use of a machine. She denied that in January 2007 Custom Agencies was operating from the premises of Allprod.

15.2 She was one of the employees that had signed the fixed term contract with Custom Agencies and had continued her employment which was subsequently turned permanent until April 2015.

15.3 During her employment under Custom Agencies, she had performed the same functions as under Allprod, using the same machine. Marius Van Wyk, Bradish, "Lockie" and Justice Lamola had continued to be the managers under Customer Agencies for a period of one year.

Evaluation:

[16] A consideration in deciding applications for absolution application is that of the question of onus. In this case, the applicant chose to commence with their case, and what this therefore implies is that they must establish a *prima facie* case that the dismissal as established, fell within the purview of section 187 (1) (g) of the LRA.

- [17] In contending that absolution should be granted, Adv Beaton SC on behalf of the respondent had submitted that the applicants had not *prima facie*, demonstrated that there was a transfer of the same business as a going concern in the light of the differences in products produced and sold; that there was no evidence to substantiate the allegation that the two entities produced the same product and serviced the same clients.
- [18] It was further submitted on behalf of the respondent that the only evidence before the court in regards to the reason for the dismissal was that the employees had refused to sign the fixed term contract with Custom Agencies, having been told that Allprod was to closed down for financial reasons, and thus far, nothing was mentioned by either of the two witnesses called that the dismissals were due to a transfer of a business.
- [19] On behalf of the applicants, Mr. Cartwright submitted that a *prima facie* case was laid out requiring a response from the respondent. In this regard, it was submitted that Mdluli had testified to different codes being used for harnesses which was the end product of the production process of the two entities. It was further submitted that after Allprod closed down, the employees once transferred to Custom Agencies continued to perform the same functions as before, utilising the same machines; serviced the same customers were under the same directors and management.
- [20] It was conceded that before the transfer, Custom Agencies performed different tasks, but that on the objective facts presented, there was indeed a transfer as contemplated in section 197 of the LRA. Mr Cartwright further submitted that the employees lost their jobs as a result of Custom Agencies attempting to avoid the operation of the provisions of the LRA and by offering them fixed term contracts. To this end, it was contended that there was a case laid out for a finding to be made on a balance of probabilities that there was indeed a transfer of the business, and that the dismissals were therefore automatically unfair.

[21] In *Frannann Services (Pty) Limited v Simba (Pty) Limited and Another*⁷ this Court, (Per Van Niekerk J), quoting with approval the European Court of Justice, held that;

‘The general rule remains that in *Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* [1997] IRLR 255 (ECJ) where the court held that the mere fact that the service of the old and new awardees of a contract is similar does not support the conclusion that an economic entity has been transferred – “an entity cannot be reduced to the activity entrusted to it”.⁸

[22] In line with the above principles, the difficulties encountered in this matter are as follows;

22.1 Allprod and Custom Agencies utilised the same premises. Despite there being some form of relationship between the two entities, Mdluli could not state who was Allprod’s biggest customers were; did not know what the end products of Allprod were and did not know what its relationship with other companies was.

22.2 Mdluli conceded that the employees were informed that Allprod was going to close down as it was ‘short of money’. She could however not respond to various material propositions put to her that distinguished the operations of the two entities. She had nevertheless conceded when it was put to her that Allprod produced automotive tracking devices, whilst Custom Agencies did not do so in 2007.

22.3 Mokoena’s evidence was equally unhelpful as she could not in clear terms tell the difference between the different wirings she was required to produce as compared to what Custom Agencies produced. Ultimately however, Mdluli’s evidence was that the employees were dismissed for not signing the fixed term contract with Custom Agencies.

⁷ (2013) 24 ILJ 897 (LC) at par 7

⁸ *Frannann, supra*, at para 12.

22.4 The reliance by the applicants on the Certificate issued by the Registrar of Companies regarding Allprod dated 10 October 2013⁹ does not take their case any further. The certificate only indicates that Allprod's deregistration was final, and that the management team identified by the witnesses as being part of both Allprod and Custom Agencies, viz Kunz and Bradish are cited in the certificate as directors of Allprod.

[23] In the light of the above difficulties, and having had regard to the substance of the alleged transfer, it is further taken into account that the evidence in regard to Allprod's ex-employees having been taken over, and utilising the same machines as they had used whilst employed by All prod remains uncontested. Furthermore, the mere fact that the employees now with Custom Agencies perform the same functions as before with Allprod does not support the conclusion that there was a transfer. The evidence tendered thus far was also weak in regards to who the customers of the two entities are or were, and even if the same business was being carried on by Custom Agencies, it is not from the evidence, clear as to what the end product of that service is.

[24] Flowing from the concession that before the alleged transfer, Custom Agencies had performed different functions, even though the two entities' employees helped each other, a further difficulty arises from the fact that what appears to have taken place in this case was a closure of Allprod as a result of operational requirements. Whether there were proper consultations and whether there were substantive reasons for the closure is a matter which is not being pursued or before the Court. Be that as it may, just prior to the closure, the employees were offered fixed term contracts with Custom Agencies which some had accepted whilst the applicants in this case had not. Despite the two witnesses denying that they were informed that the contracts would be assessed, it was nevertheless common cause that those employees who had accepted the contracts ultimately were permanently employed. On the evidence led thus far, the applicants appeared to have been dismissed for no reason other than that they had refused to accept the fixed term contract,

⁹ Page 4 of the applicants' bundle

and there is no basis for a conclusion to be reached, *albeit* on a *prima facie* basis, that indeed there was a transfer of Allprod's business as a going concern as contemplated in section 197 of the LRA.

- [25] The principles applicable to automatically unfair dismissals as contemplated in section 187 (1) of the LRA were set out in *In SACWU and Others v Afrox Ltd*¹⁰ where the Labour Appeal Court held that:

'The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered.....I would respectfully venture to suggest that the most practical way of approaching the issue would be to determine what the most probable inference is that may be drawn from the established facts as a cause of the dismissal, in much the same the most probable or plausible inference is drawn from circumstantial evidence in civil cases....'

- [26] In line with the principles set out in *Afrox*, the Labour Appeal Court again in *Kroukam v SA Airlink (Pty) Ltd*¹¹, held if the 'dominant or principal reason or reasons' for the dismissal was a reason listed in section 187(1), the dismissal would be automatically unfair, and further added that;

'.... even if the reasons that I have found to constitute the dominant or principal reason or reasons for the dismissal did not constitute the principal or dominant reasons for the appellant's dismissal, I would still find that the dismissal was automatically unfair if such reasons nevertheless played a significant role in the decision to dismiss the appellant. In my view for policy considerations, where such reasons have influenced the decision to dismiss to a significant degree, the dismissal should be dealt with as an automatically unfair dismissal in order to deter as many employers as possible from entertaining such illegitimate matters as, for example, racism and the exercise of rights conferred by the Act as factors in their decisions to dismiss employees.'¹²

- [27] In summary, on the facts disclosed by the evidence as presented by the two witnesses, and as further admitted in the pleadings and the pre-trial minute,

¹⁰ (1999) 20 ILJ 1718 (LAC) at para 32

¹¹ 2005) 26 ILJ 2153 (LAC) at para [96]

¹² At para [103]

the legal issues determine the matter against the applicants. The most probable inference to be drawn from the established facts and the evidence as presented, is that the cause of the dismissal, if not the most *proximate* or *real* cause, is the fact that the individual applicants had declined an offer of fixed term employment with Custom Services as an alternative to retrenchments.

[28] In the light of the above considerations and conclusions, it is found that the applicants have not presented sufficient evidence to support their claim of automatically unfair dismissal, upon which this Court, acting reasonably might find for them. In these circumstances, the respondent is absolved from the instance.

Order:

- i. The application for absolution from the instance is granted
- ii. There is no order as to costs.



Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicants:

Mr. D Cartwright of D Cartwright Attorneys

On behalf of the Respondent:

Adv RG Beaton SC

Instructed by:

De Villiers & Du Plessis Attorneys

LABOUR COURT