THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

CASE NO: JS 861/10

In the matter between:

LEWUSA obo MEMBERS
(LISTED ATTACHED MARKED "B") Applicant

and

CLEAR WATER FARMS Respondent

Date heard : 31 August 2015
Date delivered : 25 November 2015

Summary : Automatically unfair dismissal, real reason for dismissal based on employees' refusal to resign from trade union.

JUDGMENT

BALOYI AJ

[1] Twenty-four Individual Applicants *(Applicants)* approached this court following unsuccessful conciliation of their alleged unfair dismissal dispute. They are seeking an order that their dismissal be declared automatically unfair, alternatively substantially and procedurally unfair. Reinstatement and/or maximum applicable compensation being the ultimate relief sought.

Background to the dispute

[2] The Applicants were employed by the Respondent on various dates as farm labourers. The 7th June 2010 was their last working date. The circumstances leading to their departure are in dispute. They allege being dismissed by the Respondent through Mr Steven Calaca Senior *(Calaca Senior)* while the Respondent denies ever dismissing them. On 08 June 2010 with assistance of their trade union, LEWUSA referred unfair dismissal dispute to the CCMA. On 20 August 2010 the conciliating Commissioner issued a certificate of outcome to the effect that the dispute remained unresolved. The conciliator recorded in the certificate of outcome that the dispute was about automatically unfair dismissal of the Applicants. The Respondent did not attend conciliation proceedings. The union official who assisted the Applicants was identified as Mr Msimanga. The Applicants did not know the name of their trade union except that it belonged to Msimanga. At the time of referral of the dispute for adjudication Msimanga and the trade union did not participate in the matter though the trade union was cited as a party acting on behalf of Applicants. The Applicants eventually obtained services of firm of attorneys, Ndumiso Voyi Incorporated on *pro bono* basis. During trial proceedings they were still utilizing the services of the said attorneys.

[3] Since the parties are not in agreement on how the employment relationship between themselves came to an end, the court is as such required first to determine the existence of dismissal. The parties further required the court to rule on whether the Applicants' dismissals were automatically unfair should the existence of dismissal be found. Furthermore whether relief should be awarded to the Applicants should there be a finding on unfairness of the dismissal. It is worth mention that certain parts of Respondent's bundle of documents were after objection to their production excluded. In other words, the Respondent was barred from using them in the light of having been handed to the Applicants' representative on the morning of the trial. Such handing of documents did not comply with discovery procedures as set out in the pre-trial minutes. They were rejected on this basis, coupled with consideration of prejudice.

[4] A total of fourteen Individual Applicants were present at court during trial. Their presence indicated their interest in pursuing the matter. They were identified as: (1) LV Mahundla, (2) MJ Mokwena, (3) S Ndlovu, (4) CA Samuel, (5) MJ Nkanyane, (6) JM Nkanyani (7) KT Radau, (8) M Moreko (9) M Mosamane, (10) NS Baloyi, (11) M Tsolele, (12) A Ramulongo, (13) N Mabudo, (14) BA Nokhunka.

[5] It was reported that two Individual Applicants passed away after institution of these proceedings. No letters of appointment of their respective estates' representatives were furnished. Their position is thus treated as that of the rest of Individual Applicants who did not attend court. The only conclusion to be drawn is that there is no longer interest of pursuing litigation on their side and their claims are accordingly dismissed. I have condoned the late arrival of BA Nokhunka as it was satisfactorily demonstrated to the court that her

travelling from Mozambique caused an unavoidable delay for her timeous arrival at court.

The Evidence

Applicants' case

[6] Klara Tjiane Radau *("Radau")* tendered evidence in support of the Applicants' case that she was one of the dismissed Applicants. She started working for the Respondent in 2002. Her duties included cultivation of cabbage, beetroot and carrots. Radau worked throughout each year for the entire period she worked for the Respondent that is since 2002 until 7 June 2010 with no interruptions. According to their routine, the Applicants were rostered to perform their duties from Monday to Saturday between January and May of each year, three to four days between June and July of each year as well as Monday to Saturday between August and December of each year. They were each earning R380-00 per week except during the months of June and July wherein they each earned R300-00 per week.

[7] On Friday 14 May 2010 the Respondent's workforce at their knock off time was taken from the fields to the farm where they were introduced to a *white man,* whom according to Calaca Senior was from a trade union. The Respondent required employees to join this *white man's* union. His son Steven Calaca *(Calaca Junior)* and other Calaca family members were present. The *white man* in question was subsequently identified as Wighton Leon Roode *(Roode).* Twenty-four of the employees refused to join Roode's trade union and also refused to resign from LEWUSA. They were told that they would not work for the Respondent if they did not join the trade union introduced by the

Respondent. They were separated from employees who signed new trade union's forms.

[8] On 07 June 2010 Calaca Senior after paying their wages told them to leave. They were never summoned for disciplinary hearing. They had a good relationship with Calaca Senior and are seeking reinstatement with proviso that they be given their back pay before starting to work. They were further told by Calaca Senior that there was no longer work for them and he did not want to see them in his farm anymore. As a result they referred the unfair dismissal dispute to CCMA and ultimately to this court. They did not hear from the Respondent after their dismissal.

[9] It was further established on cross-examination that Roode was the Respondent's HR Consultant. Radau did not know that the union, LEWUSA had 188 members but a lot of employees signed forms to join Roode's new trade union. Radau persisted that employees were told that Roode was from the trade union. She conceded when put to her by the Respondent's counsel that they were told that Roode was a lawyer. She confirmed that LEWUSA subscriptions were also discussed. She however, denied that employees expressed unhappiness about the said subscriptions. She did not know about the organizational rights dispute referred by LEWUSA after their dismissal and that LEWUSA still had members in the workplace after 07 June 2010. No lay off was ever discussed. The content of the affidavit she signed was based on the fact that Calaca Senior told them that Roode was a lawyer.

[10] Her further evidence revealed that she did not know that the purpose of the meeting was one way of Respondent's intervention on employees' complaints about union deductions. She did not know about Roode's

letter stating that some people needed to work during lay off. Msimanga was handling their unfair dismissal case and the Department of Labour matter until his disappearance. The affidavit she signed was compiled by Msimanga. The Respondent discriminated them by separating them from those who joined a new union. She maintained that there was indeed a new union introduced in their workplace on Friday 14 May 2010 during which they were told to join it, failing which their jobs would no longer be secured as they would be dismissed for not joining such union of Roode. She would not have left her job had she not been the dismissed.

Respondent's case

[11] In his evidence Wighton Leon Roode *("Roode")* testified that he was at all material times a Labour Consultant with B Iuris and LLB degrees. On 14 May 2010 he was present at the meeting in his capacity as Respondent's HR Practitioner. The meeting was necessitated by various problems including a strike over organizational rights called by LEWUSA which started organizing in March 2010. The number of employees used to fluctuate as Respondent's operations were seasonal. Although the main issue was employees' complaints over union deductions, he held a view that the meeting was over verification of LEWUSA membership. The common complaint was that varying amounts were deducted to cover LEWUSA subscription. The Respondent's concern was that the employees were illiterate and it was established that some of them acknowledged having signed authorization for deductions but did not know the consequences thereof.

[12] As a result the Respondent found itself with no option but to inform employees that they were at liberty to state if they were not interested

in the union. At no stage was it suggested to employees to join an alternative union as he did not belong to any union. The forms produced were LEWUSA membership forms aimed at verifying the identity of concerned employees and to confirm if they signed. Employees who consented to deductions signed accordingly. The relationship with the union was on going. He did not hear from the union after 07 June 2010. He was concerned with formalizing the Respondent's relationship with the union particularly in handling the seasonal operations to eliminate possible suggestions of unilateral change to terms and conditions of employment. He learnt about Applicant's dismissal when Department of Labour contacted him over UIF claims and he duly informed the department that they were not dismissed. The notice of set down for conciliation was not received hence the Respondent's non appearance. He was not present in the meeting of 07 June 2010. He never met Msimanga.

[13] It came to record during Roode's cross examination that the union was not called to the meeting of 14 May 2010, which meeting was merely aimed at verifying if employees completed and signed forms. The union was aware of the meeting and they did not demand to attend nor object to the said meeting. He acknowledged that the employer had no role in the relationship between the union and its members but it was important to verify and establish if authorization was valid. He only informed the union after the meeting about problems experienced with collection of subscriptions. There were disputed signatures which amounted to fraudulent dealings on the part of Msimanga hence the option of resignation from their union, LEWUSA, was given to employees.

[14] His further evidence is that there was misunderstanding as the Applicants thought they were dismissed when they were told about the

lay off. The Respondent could not give the issue of misunderstanding further consideration because Applicants had already referred dispute to CCMA and that they secured employment in neighbouring farms. The Respondent gave correct statement to the Department of Labour that Applicants were not dismissed. They were as a result unable to assist the Applicants any further regarding UIF claims because they did not have Identity Documents and were uncontactable. The union acted prematurely by referring the dispute to CCMA. The Respondent approached them to come back and to this point the Respondent still wanted them to come back. No proposals were brought to Applicants' attention. He conceded that in his letter to the union he did not mention that employees signed up LEWUSA membership under duress, he did not state anything about meeting of 14 May 2010 and that some employees left on 07 June 2010, that some employees signed union resignations. He however confirmed having stated amongst others that the Respondent was not obliged to make union deductions in the light of threshold been less than 50%, and that the Respondent advised the union to collect subscriptions from its members as employees were against deductions.

[15] Steven Calaca Junior is the co-owner of the Respondent together with his father Calaca Senior and brother Gabriel. He testified that the Respondent's business is that of vegetable farming with approximately 200 employees. There were vegetable, cattle and maize farms in the neighbourhood. He was present in the meeting of 14 May 2010 which its purpose was to verify union membership in the light of complaints received from employees over union deductions. In that meeting 120 people resigned from LEWUSA while 80 - 100 remained. There was no other union introduced and there was no employee compelled to resign from the union. Employees worked in groups daily. In some instances they were required to work less days or laid off for up to two

months. Some employees do leave voluntarily and come back in August.

[16] On 07 June 2010 he did tell the employees (including Applicants) that he did not need their services due to lay off and would contact them. He maintained that he was present on 07 June 2010. He did not see any misunderstanding as the system was applied for thirty years. Roode's role was to formalize the layoff system by putting together a document to be used. The affected employees were handed a document and every employee was called back but Applicants did not honour the call. He learnt from Applicants' fellow employees that they had no intentions of coming back to work.

[17] He emphasized during cross-examination that there was no need to call the union in the verification meeting of 14 May 2010 nor to inform the union about union deductions complaints. It was according to him a proper procedure to hold the meeting with union members in the union's absence. The Respondent did not inform the union about the outcome of verification. The employees actually asked to resign from the union during the meeting hence more copies of resignation forms were generated. The call for verification exercise was precipitated by union's enquiries about subscription monies. It was a yearly thing for him to tell employees to return in August. He relied on his foremen to inform the laid off employees to return to work. He did not use the union to communicate with these workers as it was easy to use foremen who resided in the same area as laid off employees. He did not know that he had to discuss lay off with the union. He did not know how to contact the Applicants after the referral of 08 June 2010 as they secured other employments. The Applicants did not have other disputes with Respondent after 07 June 2010. He did not know as to

why organizational rights dispute was referred. LEWUSA is still having members in the Respondent's work place.

Arguments

[18] Both parties argued by way of written submissions which were both detailed and helpful. The Applicants argued to the effect that the case for relief sought was made based on evidence tendered and should be accordingly awarded. The Applicants further claimed for the awarding of costs. The Respondent submitted that case for automatically unfair dismissal was not made for lack of sufficient evidence to the effect. The Respondent further referred to *State Information Technology Agency Ltd v Sekgobela*[1] in support of its arguments. The Respondent sought dismissal of the application with costs.

Analysis

Existence of dismissal

[19] The Applicants certainly bear onus to establish existence of dismissal.[2] There is no settled definition of the concept lay off in our law. In practice a lay-off of employees is amongst others caused not by any fault on the part of employees but by employer's genuine operational requirements, such as lack of work for employees, shortage of raw materials, deficit and shortage of inputs related to productivity, or breakdown of machinery. A lay-off does not mean that employees are terminated from their jobs, but that such employees could be reinstated after, for example, revivifying of deficit or shortages which affected productivity. With regard to this matter it remains undisputable that

[1] (2012) 33 ILJ 2274 (LAC).
[2] 192(1) of the LRA.

before 7 June 2010 the Respondent never sent any notice to the Applicants nor their union notifying them that it contemplated laying the Applicants off for operational requirements and inviting them to any consultation to consult about the said lay-off. The reasonable inference is that on or before 7 June 2010 the Respondent never contemplated laying off the Applicants and there is no evidence of any operational requirements which can be said to have justified such lay-off.

[20] The Applicants' evidence which appears to be more probable is that from the respective dates of their commencement of employment with the Respondent until 7 June they were never laid-off. Put the other way, there were no interruptions of their continuous services with the Respondent. What actually happened is that the Applicants were rostered to perform their duties from Mondays to Saturdays between January and May of each year, three to four days between June and July of each year, and from Mondays to Saturdays between August and December of each and every year. They earned R380.00 per week per each employee except during the months of June and July wherein they each earned R300 per week.

[21] According to Radau the Applicants were told by Steven Calaca Senior that he did not need their services while Calaca Junior claimed to be the person who conveyed the said message. What is material and relevant in this regard is that on 07 June 2010 the Applicants were told that their services would not be needed by the Respondent. The material fact remains that Calaca Junior and Calaca Senior are the co-owners of the Respondent with authority to act on behalf of the Respondent. Armed with this authority it can safely be accepted that either of them acted on behalf of the Respondent to convey a message to the Applicants which led to Applicants' departure. The evidence of

Steven Calaca Junior, the co-owner of the Respondent that on 07 June 2010 he told the Applicants that he did not need their services is consistent with Applicants' case that on 07 June 2010 they were told to leave as there was no longer work for them. The Applicants' evidence that they heard nothing from the Respondent after 07 June 2010 remained unchallenged. The Respondent's averment that they were not contactable denotes that there was no intentions on its part to re-employ the Applicants after the alleged lay off period. If one is told by his employer that his services were no longer needed, this is simply nothing but termination of employment relationship at the instances of the employer which amounts to dismissal. In the premises I have no doubts that the Applicants have made a case in establishing existence of dismissal.

Merits of the dispute

[22] The Applicants based their claim on section 187(1)(d) of the LRA which renders the dismissal automatically unfair if the reason for dismissal is rested on employer's acts which are contrary to section 5 of the LRA. Section 5 essentially offers protection of the employees or job seekers when exercising the rights in terms of the Act. In other words victimization of employees for the reason above is prohibited and a dismissal associated with such victimization becomes automatically unfair.

[23] It is clear from section 192 (2) of LRA 1995 that onus remains on employer throughout trial. Employee only has evidentiary burden to adduce evidence to combat prima facie case Since onus remains on employer throughout trial, employee's evidence is to raise credible possibility that automatically unfair dismissal had taken place. Employer is then to prove the contrary All Applicants need to do to

place the Respondent on defence is to raise credible possibility that automatically unfair dismissal did occur, and thereafter the Respondent is then required to prove that dismissal is fair (See *Janda v First National Bank*[3], *Rockliffe v Mincom (Pty) Ltd*[4] *and Thomas v Mincom (Pty) Ltd*.)[5]

[24] There is some doubt about an existence of Roode's union which the Respondent allegedly wanted the Applicants to join after resigning from their own union. The alleged union remained unidentified and the position of Roode as Respondent's HR Consultant and lawyer was not disputed. There is no sufficient evidence that there was collusion between Roode and Respondent's management to recruit them to join the other union. However this is colateral issue.

[25] The main and decisive issue is Respondent's active role in assisting the employees to resign from LEWUSA. It appears to be common cause that the Respondent assisted employees to resign from LEWUSA. The Respondent's version is that employees were given an option to resign from the union if they were unhappy with deductions. Such assistance does not appear to be in good faith nor in the interest of employees. The Respondent took advantage of their lowest level of literacy. The Applicants' case on this point suggests that the signing of forms was based on coercion as they were categorically informed that any person not signing would no longer work for the Respondent.

[26] It is in fact difficult to find merit in Respondent's version that its relationship with the union was smooth or that it acted in the best interests of the union members in carrying out the verification process

[3] (2006) 27 ILJ 2627 (LC)
[4] (2007) 28 ILJ 2041 (LC)
[5] (2007) 10 BLLR 993 (LC)

to assist the vulnerable employees. The aforesaid version contradicts Respondent's own case that:

26.1 union official Msimanga was fraudulent in his dealings,

26.2 the union called strike,

26.3 there was no need to involve union about the verification exercise,

28.4 there was no need to inform union of the outcome of the verifications in question,

28.5 the union was directed to collect subscriptions directly from its members,

28.6 the Respondent had not been prepared to administer deductions because the union had no 50% plus representation.

[27] Furthermore the contradictory version by Roode that the trade union subsequently did not have membership any longer flies in the face of Calaca Junior's evidence that the union still has. It becomes vividly clear that the Respondent's pushing for employees' resignations from the trade union was a quick measure of making the employees to give up the trade union membership. The Applicants became casualties for their refusal to give up their membership of the trade union. This certainly reveals that the reason for dismissal of the Applicants was to penalize the Applicants for their lawful decisions to remain union members of LEWUSA. This in no uncertain terms goes against the provisions of section 5 regarding the prohibition of any attempt to sway employees to give up membership of the trade union or workplace forum.

[28] In *SA Freight & Dock Workers Union v Safcor Freight (Pty) Ltd t/a Safcor Panalpina & Others*[6] the Court held that employer's decision to incentivize non union members with 4.5% increase and placing a condition upon them that the increase would be reversed should they join a trade union in the future, was in violation of provisions of section 5 and discriminatory. The Court specifically per Cele J held as follows;

> "[34] The change was accompanied by an early salary increase for the non-unionized employees in Durban to the exclusion of the member of the Applicant. The conditions attendant to the salary increase are clearly a prima facie infringement of 5, particularly 5(2) (a) and 5(3) of the Act. The conditions discouraged a non-union member from exercising a right protected by the Act to join a union at his or her discretion, for a specific period of time. The Respondent has not really tendered an explanation for its approach in this regard. It chose to explain the inequality brought about by the plurality of its bargaining agents. Inequality brought about by the plurality of bargaining council agents is one matter. It has nothing to do with dissuading an employee from exercising his right to join a union. All employees of the Respondent had a right to join a union of their choice. Those employees of the Respondent base in Durban were discouraged by the condition of the salary increase from joining a union when those based outside of Durban were not. The conditions brought about an unequal treatment by the Respondent of its employees without a valid and a fair reason."

[29] It is of high importance to mention that the above reasoning was confirmed by the Labour Appeal Court in *Safcor Freight (Pty) Ltd t/a Safcor Panalpina & SA Freight & Dock Workers Union*[7]*.* There is no reason why this principle should not find application in this instant case. Particular regard is given to the fact that the employees who were not willing to resign from LEWUSA were no longer guaranteed employment. The Applicants whom it is not in dispute that they did not resign from LEWUSA as directed by the Respondent ended up being

[6] [2011] 32 ILJ 415 (LC)
[7] [2012] 12 BLLR 1267 (LAC)

terminated. The Respondent's version that Applicants left as a result of misunderstanding and that there were many other people who did not sign resignations, is regrettably not backed by evidence nor raised in its pleadings. In the absence of sufficient evidence to rebut what the Applicants established, there is no other finding to be made than that the Applicants have succeeded in raising credible possibility that automatically unfair dismissal did occur. The Respondent has hopelessly failed to prove that such dismissal is fair for any other legitimate reason.

[30] In the circumstances the Applicants' dismissal is found to be automatically unfair. Regarding relief, it is my view that reinstatement cannot be an appropriate remedy in the given facts. Radau's evidence that the Applicants wanted reinstatement on condition that they be compensated before they would tender their services, is indicative of the fact that they may not be really willing to work for the Respondent. The Respondent pointed that most of them took up employment in the neighbouring farms though not put to Applicants' witness. Interestingly these are the persons who were not contactable. This shows that the restoration of employment relationship is near impossibility. It is worth saying that this does not preclude the Court from ordering reinstatement in the light of the Constitutional Court's decisions in *Billiton Aluminum SA Ltd t/a Hillside Aluminum v Khanyile*[8] and *Equity Aviation Services (Pty) Ltd v CCMA & Others*[9] saying that alternative employment cannot be a bar to reinstatement].

[31] I am under the circumstances inclined to grant each Applicant maximum compensation equivalent to 24 months' remuneration. Specific regard is given to seriousness of the Respondent's

[8] [2010] 5 BLLR 465 (CC)
[9] [2008] 12 BLLR 1129 (CC)

transgression of Applicants' constitutional and legal right to remain union members of the own trade union.

[32] Both parties argued for costs against each other. The fact that the Applicants were represented by counsel on *pro bono* basis, does not bar the Court from ordering costs in their favour where warranted (*See Abrahams v Drake & Scull Facilities Management (SA)(Pty) Ltd*[10] Such order in my view should be considered together with requirements of law and fairness coupled with judicial discretion vested upon the court. The court has also taken into account that there is no more ongoing relationship as their reinstatement order has not been granted.

<u>**O**rder</u>

[33] In the premises I am inclined to make the following order;

33.1 The dismissal of the Applicants is declared automatically unfair under section 187(i)(d).

33.2 The Respondent is ordered pay compensation to each Applicant equivalent to 24 months' remuneration, calculated at the rate of remuneration such Applicant earned on the date of dismissal.

33.3 The Respondent is ordered to pay the costs of suit.

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BALOYI AJ

Acting Judge of the Labour Court of South Africa

[10] [2012] BLLR 434 (LC).

Appearances

For the Applicant:	D Z Kela
Instructed by:	Ndumiso Voyi Inc
For the Respondent:	A J Nel
Instructed by:	G Lindeque Attorneys