



Not reportable

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 315/2011

In the matter between:

CSAAWU obo DUBE and others

Applicants

and

ROBERTSON ABBATOIR

Respondent

Delivered: 18 May 2015

RULING ON LEAVE TO APPEAL

STEENKAMP J

Introduction

- [1] The applicant union, CSAAWU (acting on behalf of 39 of its members), seeks leave to appeal against my ruling of 23 March 2015 granting the respondent absolution from the instance.

The applicants' case

[2] In order to consider whether there is a reasonable prospect that another court may come to a different conclusion¹, it is important to understand what the applicants' case was.

[3] As noted in the judgment *a quo*, that case was initially hard to fathom. It became crystallised in a lengthy debate between the Court and the applicants' counsel in an interlocutory application brought by the respondent in July 2014. The respondent challenged the jurisdiction of this Court to decide on the dismissal of nine of the applicants who were dismissed after a disciplinary hearing on 23 December 2010. The applicants' senior counsel, Ms De Vos SC, then made it clear that the applicants' case would stand or fall on their argument that all of the applicants were dismissed on 30 November 2010, and not on 1 December (in the case of 30 applicants) or 23 December (in the case of the remaining nine). She further grounded the applicants' case squarely on a "lockout dismissal" in terms of s 187(1)(c) of the Labour Relations Act.²

[4] In their heads of argument in the interlocutory application, the applicants' counsel say pertinently:

"The applicants contend that 42 workers who are members of the first applicant (CSAAWU) were locked out by the respondent on 30 November 2010, in order to compel them to accept a demand by the respondent in respect of the daily targets for slaughtering rates.

... CSAAWU contended that all the workers had been dismissed on 30 November 2010 by means of an illegal lock-out."

[5] The following exchange between the Court and counsel -- one of many where the Court attempted to clarify what the applicants' case was -- is instructive:

"*Court*: What is your client's case? Is it saying that there was a lockout dismissal on 30th of November or is it saying or does it accept as it does in

¹¹ Cf the test in *NEHAWU v UCT* (2003) 24 ILJ 95 (CC) paras 25-26.

² Act 66 of 1995 (the LRA).

the pre-trial minute that one group of people was dismissed on 1 December and one group of people was dismissed on 23 December?

Ms De Vos: no the evidence that we intend to present is based on the dispute that arose with the lockout, the illegal lockout on the 30th November and we are saying that by illegally locking out the employees there was a de facto dismissal.”

Evaluation

- [6] The applicants’ individual grounds for leave to appeal must be considered against this background and against the background of a directive issued by the Court on 9 September 2014, at the request of the respondent and as a result of the ruling on *locus standi* in the applicants’ favour, that read as follows:

“1. The applicants (CSAAWU) must establish the existence of a dismissal on 30 November 2010 in terms of section 192 of the LRA and thus bears the onus to begin.

2. If the union establishes the existence of a dismissal, the respondent (Robertson Abattoir) must establish that it is fair.”

Dismissal on 30 November?

- [7] The applicants had to prove that they were dismissed on 30 November. That is the foundation on which their case was built. The reason is clear: were they to accept that they were dismissed on 1 December and 23 December respectively, nine of the applicants (dismissed on 23 December) would have had no *locus standi*. This Court ruled in July 2014 that they did have *locus standi* based on the case that the applicants presented, i.e. that they were dismissed on 30 November. It remained for the applicants to prove that case on trial. They did not. (Only once the applicants had proven that they were dismissed on 30 November, would the onus shift to the employer to prove that the dismissal was fair).
- [8] The applicants rely on *Abancedisi*³ to argue that the date and mechanism of dismissal need not be certain for the court to have jurisdiction. But there

³ NUMSA v Abancedisi Labour Services (2013) 34 ILJ 3075 (SCA).

was never any doubt that this Court did have jurisdiction to hear the applicants' case. Their case was that they were dismissed on 30 November by way of an "unlawful lockout" and that that dismissal was automatically unfair in terms of s 187(1)(c). That is the case that the court heard, having jurisdiction to do so. But the applicants did not prove that case.

- [9] As this Court forewarned the applicants in the interlocutory ruling on *locus standi* on 31 July 2014:⁴

"As Nugent JA pointed out in *Makhanya v University of Zululand* :

'When the claimant says that the claim arises from the infringement of the common law right to enforce a contract, then that is the claim, as a fact, and the court must deal with it accordingly. When a claimant says that the claim is to enforce a right that is created by the LRA, then that is the claim that the court has before it, as a fact. When he or she says that the claim is to enforce a right derived from the Constitution, then, as a fact, that is the claim. That the claim might be a bad claim is beside the point.'

In the case before me, the applicants – including the nine workers who, according to the abattoir, were dismissed on 23 December – base their claim on an automatically unfair dismissal that they say took place on 30 November 2010. That the claim might be a bad claim and might not pass muster under section 187(1)(c) of the LRA is beside the point."

- [10] In any event, the facts of this case are distinct from *Abancedisi*. In that case, the employer ceased paying the employees their wages. In this case, the employer continued paying the employees until the end of their notice period, after they had been dismissed for misconduct on 1 December and 23 December respectively. And in terms of s 190(2)(d) of the LRA:

"[I]f an employer terminates an employee's employment on notice, the date of dismissal is the date on which the notice expires or, if it is an earlier date, the date on which the employee is paid all outstanding salary."

- [11] There is simply no evidence that the applicants were dismissed on 30 November. In their heads of argument, they rely on a statement made by

⁴ *Robertson Abattoir v CSAAWU* [2014] ZACCT 38 paras 18-19.

Mr Davids (a Department of Labour official, and not an employee representative, wrongly refer to as “Daniels” in the heads) that: “Weet julle nie die mense is ge-dismiss [sic] nie?”. But the applicants were all adamant that the employer representative, Mr de Bod, was shocked when Davids said this and immediately corrected him, making it clear that it was not so.

- [12] The employer did use replacement labour on 30 November – the date when the employees, by their own admission, were told to attend a disciplinary hearing at 10:00. But they were paid for the day, and when they were eventually dismissed, they were paid for the notice period. There is simply no evidence of a dismissal on 30 November. There is no reasonable prospect that another court may find differently on the evidence before the Court.

Reason for dismissal

- [13] The applicants’ case was that they were dismissed by way of a lock-out on 30 November to compel them to accept the employer’s demand for higher slaughter targets.
- [14] But the employees were, as a fact, finally and irreversibly dismissed for misconduct on 1 December and 23 December respectively. Dube conceded that he was dismissed following a disciplinary hearing on 23 December. Their dismissals can, quite simply, not be brought within the scope of s 187(1)(c). As the Supreme Court of Appeal [per Mpati DP and Cameron JA] pointed out in *Fry’s Metals v NUMSA*⁵:

“Only conditional dismissals can fall under s 187(1)(c), and it is this that distinguishes them from the broader category of dismissals where the employer – irreversibly – ‘has terminated’ the employment contract. Dismissals intended to be and operating as final – not, in other words, reversible on acceptance of the demand – can thus never have as their reason ‘to compel the employee to accept’ that demand. They will therefore not be automatically unfair. In such cases, the only factual inquiry confronting a court is the employer’s reason for effecting the dismissal:

⁵ [2005] 3 All SA 318 (SCA); (2005) 26 ILJ 689 (SCA) para 56. See also *NUM v Mazista Tiles (Pty) Ltd* (2006) 27 ILJ 471 (SCA).

once compulsion to accept the disputed demand (with ensuing reversal of the dismissal) is excluded, no further inquiry into the nature or categorisation of the demand is required.”

[15] As the respondents’ counsel point out in their heads of argument, the applicants find themselves on the horns of a dilemma. If there was no dismissal on 30 November 2010, the applicants’ case must be dismissed on the facts. If there was a dismissal, it was final. If that is so, their case must be dismissed on the law.

[16] In any event, the applicants led no evidence that the reason for their dismissal was to compel them to accept a demand in respect of any matter of mutual interest between them and the employer.

[17] There is no reasonable prospect that another court will come to a different conclusion.

Section 187(1)(d)?

[18] The applicants initially pleaded, in the alternative, that their dismissal was automatically unfair in terms of s 187(1)(d) of the LRA. But the case was not, as they now appear to suggest in the submissions for leave to appeal, that the employer was “anti-union”. It was explained as follows in the pre-trial minute:

“The dismissed applicants were dismissed because, with effect from 22 November 2012, they exercised their rights conferred by section 5(2)(c)(iv) of the Labour Relations Act 66 of 1995 –

1. to refuse to work overtime in the absence of a binding agreement to do so “in accordance with section 10(1)(a) of the BCEA, read with section 10 (5) thereof;
2. to refuse to work in excess of 10 hours of overtime per week (in accordance with section 10(1)(b) of the BCEA); and/or
3. to refuse to work in excess of 12 hours on any given day (contrary to section 10(1A) of the BCEA).”

[19] None of the applicants led any evidence to establish such a case. And in any event, when their counsel was asked in terms if an automatically unfair dismissal in terms of section 187(1)(d) remained part of their case,

Ms *de Vos* said unequivocally: “Nee, dit is nie die saak nie. Dis nie hoekom ek die getuienis aanbied nie.”

[20] In argument, Ms *van Huyssteen* nevertheless tried to resurrect an alternative case based on s 187(1)(d), albeit faintly. (She conceded that she was “diffident” about that element of the applicants’ case). But what was now presented, was a new case based on anti-union bias, and not the case made out in the pre-trial minute based on a refusal to work overtime.

[21] This ground of appeal also fails.

Appeal against costs order

[22] The applicants also seek leave to appeal against the costs order of 23 March 2015.

[23] An appeal court will not lightly interfere with the discretion of the court *a quo* in deciding on costs. As the Constitutional Court recently held in *Mbana v Shepstone & Wylie*⁶:

“When granting costs against [the appellant], the Labour Court took into consideration the provisions of section 162 of the Labour Relations Act. In doing so, it was cognisant of the requirements of law and fairness. It considered the conduct of the parties during and after the preparation of the pre-trial minute and concluded that costs would be borne by [the appellant], but limited them only to costs incurred after the conclusion of the pre-trial minute. The determination of costs is a matter that lies in that court’s discretion. Ms Mbana has not made out a compelling argument that in exercising that discretion, the Labour Court acted capriciously or applied the law incorrectly.

Similarly, Ms Mbana has proffered no cogent argument that the Supreme Court of Appeal exercised its discretion capriciously or incorrectly when granting the costs order, nor has she identified exceptional circumstances warranting this Court’s intervention in this regard.

All be told, it is not in the interests of justice to grant leave [to appeal] in respect of the costs orders of the Labour Court and the Supreme Court of Appeal.”

⁶ [2015] ZACC 11 (7 May 2015) paras 52-53.

[24] The same principles hold true in this case. The union has shown no exceptional circumstances why the costs order should be reversed, nor has it shown that the order was granted capriciously. It led no evidence to show why a costs order against it would not be appropriate in law or fairness. And when the union said that it was not a “man of straw”, that was interpreted in the way that our courts have consistently done, i.e. to mean that it is not indigent.⁷ The costs order *a quo* was not granted capriciously or incorrectly, but after a proper application of judicial discretion. There is no prospect that a higher court will interfere. This ground for leave to appeal also fails.

Costs of this application

[25] The applicants have shown no prospects that another court will come to a different conclusion. They would have been well advised to accept the judgment *a quo* and to avoid incurring further costs. They chose not to. That necessitated the respondent incurring further costs. In law and fairness, the applicant union must pay those costs.

Order

[26] I therefore make the following order:

26.1 The application for leave to appeal is dismissed.

26.2 The applicant union, CSAAWU, is ordered to pay the costs of the respondent, Robertson Abattoir.

Anton Steenkamp

Judge of the Labour Court.

⁷ Cf *Tadyn Trading cc t/a Tadyn Consulting Services v Steiner* (2014) 35 ILJ 1672 para 14 at 1676 E; *Rham Equipment (Pty) Ltd v Lloyd* (2008) 29 ILJ 3033 (LC) paras 12-13, both citing *Gois t/a Shakespeare's Pub v Van Zyl* (2003) 24 ILJ 2302 (LC) [per Waglay J].

APPEARANCES

APPLICANTS: Anne-Marie de Vos SC
Stuart Wilson
Irene de Vos

Instructed by: SERI.

RESPONDENT: Hanri Loots
Lourens Ackermann

Instructed by: Bisset Boehmke McBlain.