



**IN THE LABOUR COURT OF SOUTH AFRICA
JOHANNESBURG**

Case No: JS162/16

In the matter between:

**NATIONAL UNION OF METALWORKERS
OF SOUTH AFRICA (NUMSA)**

First Applicant

obo

**JAN LABASE AND 7 OTHERS
Applicants**

Second to Further

and

W E GEYSERS

Respondent

Heard: 23 February 2017

Judgment: 8 May 2017

Summary: Unfair dismissal action, applicants alleging that they were dismissed in terms of section 186(1)(d) of the LRA. Applicants failing to establish either that the respondent offered to re-employ a previously dismissed employee or that they tendered their services. Action dismissed with costs.

JUDGMENT

BARNES AJ

- [1] This is an unfair dismissal action. The applicants contend that they were dismissed by the respondent on the basis of selective non re-employment in terms of section 186(1)(d) of the Labour Relations Act¹ (the LRA) and that such dismissals were unfair.
- [2] The trial commenced and was concluded on 23 February 2017.
- [3] One of the issues in dispute in the trial was the extent of respondent employer's obligations in terms of the MEIBC Main Agreement to re-hire retrenched employees. Evidence was led on this issue.
- [4] On 28 February 2017, the respondent's attorney, Clifford Levin addressed a letter to myself which read as follows:

"We have consulted with our client as well as the relevant employer's organisation and the applicable bargaining council and have determined that the issue relating to the exact content of the Consolidated Main Agreement has not been fully ventilated in terms of its relevance pertaining to this matter.

In respect thereof, we have made various enquiries into the correctness of the published version as it was not the position at the time of the retrenchment of the employees and therefore any changes that were made to the Consolidated Main Agreement may not be relevant for the Honourable Court's determination.

¹ Act 66 of 1995

We have requested consent from the Applicant parties' legal representatives, to which same have responded to state that they reserve their right to oppose same.

Accordingly, our offices humbly request that our offices be allowed to submit supplementary heads of argument by the close of business on 2 March 2017, or on such date as determined by the Court."

[5] On 1 March 2017, correspondence was received from the applicants' attorney in which they objected to the aforesaid request.

[6] On 2 March 2017, I issued the following directive:

- " 1. The correspondence received in relation to this matter refers.
2. The trial in respect of this matter was concluded on 23 February 2017.
3. The issue raised by the respondent in the letter from its attorneys, Clifford Levin Attorneys, dated 28 February 2017 is a factual one.
4. Accordingly, if the respondent is of the view that it is necessary to ventilate this issue, it is required to bring an application to re-open its case.
5. If the respondent intends to bring such an application, it is required to do so within 5 (five) court days of the date of this directive, failing which the court will proceed to deliver judgment in this matter."

[7] On 7 March 2017, the respondent launched an interlocutory application not for leave to re-open its case as directed but for leave to file supplementary heads of argument. The applicants oppose the application.

[8] The respondent's application does not comply with my directive and stands to be dismissed for this reason alone.

[9] Turning to the merits of the action, the applicants contend that they were dismissed in terms of section 186(1)(d) of the LRA which provides for a form of statutory dismissal where "*an employer who dismissed a number of*

employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another.”

[10] This form of dismissal is possible only when it has been preceded by a ‘conventional’ dismissal and the employees concerned were dismissed in similar circumstances.

[11] Selective re-employment constitutes a dismissal only when one or more of the formerly dismissed employees have been offered re-employment, and when others have been refused re-employment. It is the *refusal* of the employer to re-employ dismissed employees that triggers this form of dismissal. It follows that before former employees can be dismissed in this way, they must have tendered their services.²

[12] It was common cause that the applicants were retrenched by the respondent with effect from 30 November 2014.

[13] In order to establish that they were subsequently dismissed by the respondent in terms of section 186(1)(d) of the LRA, the applicants bore the onus to establish two critical facts:

13.1 first, that the respondent offered to re-employ or re-employed one or more employees previously dismissed by it; and

13.2 second, that the applicants tendered their services to the respondent and the respondent refused to re-employ them.

[14] In my view, the applicants failed to establish either of these facts on the evidence.

[15] The applicants were able to point to only one person whom they contended had been re-employed by the respondent, Mr Tshepo Chelechele. However,

² See Grogan *Workplace Law* (Juta, 11th ed) at p 173 – 174.

the evidence for the respondent was that Mr Chelechele had at all times been placed with it by a labour broker, Ebutsi Services Gauteng (Pty) Ltd. The applicants were unable to dispute this and could therefore not establish that Mr Chelechele had been offered re-employment or re-employed by the respondent.

[16] The applicants therefore failed to establish the first critical fact.

[17] The applicants led the evidence of only one witness, Ms Matsena, a legal officer of NUMSA. Ms Matsena testified that she addressed a letter to the respondent in the following terms:

“It has come to our attention that WE Geyser has been employing new candidates on permanent basis and others temporarily.

We would like to refer you to Annexure A of the Main Agreement, paragraph 2.6 which deals with the re-employment of retrenched employees.

Paragraph 2.6.1 of the Main Agreement states *‘if an employer who has previously retrenched employees engages new employees, that employer must as far as possible give preference to the engagement of those persons who were retrenched from the establishment during the preceding 36 months and who are qualified and available to undertake the categories of work required by the employer.’*

It is clear from the above section that you are in breach of the main agreement as you have employed new people within 36 months and failed to recall the old employees that were retrenched on 30 November 2014.”

[18] This does not however amount to a tender by the applicants of their services. Ms Matsena confirmed under cross examination that she did not advise the respondent at any stage that the applicants were available to work and that they tendered their services to the respondent. On the contrary, Ms Matsena stated that the purpose of her letter was simply to inform the respondent that it was in breach of the Main Agreement.

[19] The applicant therefore failed to establish the second critical fact in order to make out a case in terms of section 186(1)(d).

[20] There is in any event a further reason why the action cannot succeed. It emerged during the evidence that the respondent company ceased trading in December 2016 and that there has been a transfer in terms of section 197 of the LRA to a new entity by the name of Duratherm Geysers (Pty) Ltd. Duratherm is not a party to these proceedings. This means that the correct employer is not before Court and that any relief granted against the respondent would be ineffective and, accordingly, incompetent.

[21] For all these reasons, the action must fail. I see no reason why costs should not follow the result.

[22] I therefore make the following order:

Order

1. The respondent's interlocutory application is dismissed with costs.
2. The applicants' action is dismissed with costs.

Heidi Barnes
Acting Judge of the Labour Court

Appearances:

For the Applicants : Advocate T Govender

instructed by : Ruth Edmonds Attorneys

For the Respondent: Mr C Levin of Clifford Levin Attorneys

LABOUR COURT