



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS90/16

In the matter between:

SOLANI MTETWA

Applicant

and

HOWDEN AFRICA (PTY) LTD

Respondent

Heard: 17 August 2017

Delivered: 28 September 2017

Summary: Reason for dismissal - Automatically unfair dismissal in terms of section 187(1)(f) of the LRA or Operational requirements in terms of section 189A of the LRA - Failure to plead the grounds of discrimination is fatal to applicant's claim - Dismissal based on the respondent operational requirements is substantively fair.

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] This case concerns the determination of the real reason for the applicant's dismissal. The applicant alleges that she was discriminated against and that the dismissal is automatically unfair in terms of section 187(1)(f) of the Labour Relations Act¹ (the LRA). The respondent, on the other hand, alleges that the applicant was dismissed for operational reasons. It is common cause that the procedure that led to the applicant's retrenchment was undertaken under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA) in accordance with section 189A(3) and (4) of the LRA.

[2] The applicant's claim is summarised in her amended statement of claim as follows:

"6.1 an unfair retrenchment of the applicant as *inter alia*:

6.1.1 the respondent was utilising S189A retrenchment process to hide/cover up an unfair dismissal, which in essence was not based on operational reason and did not fit the criteria for such a dismissal.

6.1.2 ...

and/or Alternatively

6.2.1 as the respondent was not entitled to directly or indirectly discriminate against the Applicant by impairing her dignity and standing, and her reliance on the LRA and the law, and then attempt unfairly to utilise the provision of section 189A of the Labour Relations Act to dismiss the Applicant, when history and circumstances in which the parties were in, would not have fairly allowed for such."

Background facts

[3] The applicant was employed as a Statutory Accountant. She was dismissed on 30 November 2015. According to the respondent, the reason for the applicant's dismissal was its operational requirements. It is common cause that the

¹ Act 66 of 1995 as amended.

respondent conducted three phases of retrenchments in 2015. There were 25 employees affected during the second phase, including the applicant. Given the number of affected employees, a section 189A² process was undertaken under the auspices of the CCMA.

- [4] The unionised employees were represented by the NUMSA and UASA. Whilst the non-unionised, including the applicant, were duly represented by co-employees during the consultation process. At the end of consultation, a retrenchment agreement was concluded between the respondent, UASA and the non-unionised employees on the terms and conditions of the retrenchment of the affected employees.

Applicant's case

- [5] The applicant stated that she had been a victim of discrimination subsequent to an incident that happened on 18 December 2014, when she failed to release wages to employees. As a result, employees embarked on an unprotected strike and the respondent suffered a loss of R7175 in bank charges. She was suspended and later charged with negligence. On 15 January 2015 she was found guilty and a penalty of a final written warning was imposed. Two weeks later, she was suspended again on charges of insolence and unauthorised absence from work. On 25 January 2015 she was found guilty and another penalty of a final written warning was imposed.

- [6] According to the applicant, it became clear as from that time that the respondent intended to get rid of her and the following occurrences bolstered her belief:

6.1 Initially her role included internal audit, integrated reporting and taxation. She was reporting directly to Mr Kevin Johnson (Johnson), the Chief Financial Officer (CFO). Her role changed in 2011, when the Group Financial Manager, Ms Mary-Ann Shongwe Musekiwa (Shongwe Musekiwa), was employed. As a result, for three years (2011, 2013 and

² Section 189A of the LRA.

2014) she never received a salary increase because she was allegedly over paid.

6.2 The respondent inconsistently applied discipline. Ms Mainella Vigoroux (Vigoroux) failed to release VAT and as result the company incurred a loss of R1.5 million. However, Ms Vigoroux was never disciplined because she is white. Conversely, Ms Shongwe Musekiwa accused the applicant of poor performance and denied her a bonus in 2014.

6.3 Upon her return from the second suspension in January 2014, she was shocked to find Mr Kulani Mlambo (Mlambo) occupying her desk. She was informed that he was employed to assist. The applicant trained Mr Mlambo on how to do an integrated report, a Johannesburg Stock Exchange (JSE) requirement, despite him being a Chartered Account (CA). She was also expected to drop Mr Mlambo home in Soweto when they worked till late at night. Upon the departure of Ms Shongwe Musekiwa, Mr Mlambo was appointed to act in her stead.

6.4 The applicant's relationship with Ms Shongwe Musekiwa turned sour after the disciplinary hearings. On April 2015, she sought Mr Johnson's intervention. He responded by changing the applicant's role and reporting lines. Subsequently, the applicant reported directly to Mr Johnson. The discussion on the details of the new role became unpleasant. The applicant escalated her complaint to the Chief Executive Officer (CEO), Mr Thomas Bawarld (Barwald), who in turn offered her three months' salary as an exit package. She refused the offer and insisted that clarity be given on the new role. She was told that she was an Assistant Accountant and that she had to relocate to the JHH finance area.

6.5 Sometime in July 2015, she was relocated to a working area that was humiliating. Mr Mlambo moved her to another work station but Mr Johnson did not approve of her move. She raised her concern with the manner she was treated which was distressing and made the work environment unhealthy.

- [7] On 23 July 2015 the applicant was served with a section 189A notice as a last resort to get rid of her. She told the respondent that she was not supposed to be part of the people selected for retrenchment. She had experience to perform all the duties of a Group Financial Manager and that a CA requirement was not necessary. As a result, the respondent should have selected Mr Mlambo for retrenchment had they used last in first out (LIFO), which is a fair and objective selection criteria.

Respondent's case

- [8] Ms Archerien Du Plessis (Du Plessis), the respondent's Human Resource Executive, gave evidence that the respondent conducted three separate retrenchment processes in 2015. The applicant was affected by the second retrenchment. The total number of employees that were identified was 25. The respondent consulted with the affected employees collectively by way of representation. The applicant, a non-unionised employee, was represented by a nominated fellow employee. There were feedback sessions with all employees.
- [9] The applicant could not have been considered for the position of a Group Financial Manager because she was not a CA, a requirement for the job as the respondent is a JSE listed company. Both Mr Mlambo and Ms Shongwe-Musekiwa are CA's. Ms Du Plessis denied that the applicant raised her unhappiness with the section 189A process and sought to be consulted separately. The issue of LIFO, in relation to Mr Mlambo's credentials, was raised for the first time during the CCMA conciliation.
- [10] The retrenchment was not a sham as the respondent was restructuring globally. Immediately after the conclusion of the second retrenchment, the third retrenchment commenced. The applicant's position was redundant. The respondent, as a multinational company, was affected by the economic downturn not only in South Africa, but also in other countries where it is operating. Also finances had been centralised with some functions moved to other countries.

Legal principles in relation to automatically unfair dismissals

- [11] Section 187(1) (f) of the LRA provides that a dismissal is automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.
- [12] Ordinarily, where it is common cause that there was a dismissal, the employer bears the onus to prove that the dismissal was for a fair reason permitted in section 188 of the LRA. However, where an employee alleges that a dismissal was automatically unfair, it is incumbent upon that employee to demonstrate, *prima facie*, the said claim.³
- [13] In *Bank v Finkelstein t/a Finkelstein and Associates*,⁴ the court dealt amply with the applicable test in a case of automatically unfair dismissal as contextualised in different decisions of this Court and the LAC. The Court referred with approval, *inter alia*, to *Van der Velde v Business and Design Software (Pty) Ltd and Another*⁵ where it was stated:

"At this point, the tests of factual and legal causation become relevant. Assuming the test of factual causation (the 'but for' test referred to in *Afrox*) to be satisfied, the enquiry is into legal causation, or put another way, whether the transfer or a reason related to it is the dominant, proximate or most likely cause of the dismissal. In *Kroukam's* case, it is in respect of this latter requirement (legal causation) that there appears to be a difference in approach, one that relates to the degree of dominance, proximity or likelihood that the automatically unfair reason was the reason for dismissal. On both approaches, it is clear that the automatically unfair reason need not be the

³ *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC) at para 27.

⁴ [2016] ZALCJHB 428 (26 October 2016) at paras 17 to 19.

⁵ (2006) 27 ILJ 1738 (LC.) at 1746G-1747F.

sole reason for dismissal. On the approach adopted by Zondo JP, it would appear to be sufficient that the transfer or a reason related to it significantly influenced the employer's decision to dismiss. The test postulated by Davis AJA would appear to require more than 'significant influence' This approach would seem to require that the court first determine the dominant or principal reason for the dismissal, and if that reason falls within the ambit of those reasons categorized by the Act as automatically unfair, to find that the dismissal is automatically unfair. Even if an automatically unfair reason did not constitute the principal or dominant reason for dismissal and in this sense constituted an ancillary reason, the dismissal is unfair if an automatically unfair reason influenced the employer's decision to dismiss to a 'significant degree' (My emphasis)

Analysis

[14] Applying the test of factual causation (the 'but for' test) in this case, to succeed in her claim, the applicant must at least show that she was discriminated against on a listed ground in terms of section 187(f) of the LRA or unlisted grounds analogous to the listed grounds.⁶

[15] The applicant's counsel's submission that the applicant was discriminated against because she was viewed as a problem employee who was challenging her superiors is not supported by the pleadings. At paragraph 5.4 of the amended statement of claim the applicant pleads that:

“5.4 In 2015, prior to the Respondent's Section 189A letter dated 23 July 2015 to the applicant, the allegation the commencement of section 189 process, the Respondent has unfairly:

⁶ *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at paras 47 to 48; *Prinsloo v Van der Linde and Another* 1997 (6) BCLR 759; (1997 (3) SA 1012) (CC); *Ntai and Others v SA Breweries Ltd* (2001) 22 ILJ 214 (LC) at paras 72 to 73; *National Union of Metalworkers of SA and Others v Gabriels (Pty) Ltd* (2002) 23 ILJ 2088 (LC)⁴ at paras 12, 16 and 20; *Aarons v University of Stellenbosch* [2003] 7 BLLR 704 (LC) at para 16 to 17; *Independent Municipal and Allied Workers Union and Another v City of Cape Town* (2005) 26 ILJ 1404 (LC) at paras 89 to 90; *Stojce v University of KZN (Natal) and Another* [2007] 3 BLLR 246 (LC) at para 25.

- 5.4.1 disciplined,
- 5.4.2 sidelined,
- 5.4.3 changed the Applicants job description,
- 5.4.4 changed the Applicants working conditions,
- 5.4.5 humiliated the Applicant by moving her from the Respondent's Executive Area to be placed by the kitchen, with a new employee taking over her work, with total disregard to the Applicant and her dignity.
- 5.4.6 attempted to have the Applicant in or about April 2015, accept a termination agreement based on her job performance, work relationships and alleged complaints;
- 5.4.7 engaged a new employee who began to do the work that the Applicant previously did;
- 5.4.8 employed a new employee to do the Applicant's work, despite the Applicant remaining in the employment of the Respondent."

[16] At paragraph 6.2.2 of the amended statement of claim, the applicant pleads that she was "discriminated on arbitrary ground, directly or indirectly, within the meaning of and automatically unfair dismissal, as she failed and/or refused and/or objected to the proposals and unfair manner in which the respondent chose to dismiss her which she was entitled to do."

[17] Other than listing numerous incidents as instances of the alleged discrimination, the applicant failed to plead with particularity the grounds of discrimination. This on its own is fatal to the applicant's case. An applicant who alleges an automatically unfair dismissal in terms of section 187(1)(f) is expected to do more than simply allege that the discrimination was on arbitrary grounds without pleading one or more of the grounds listed in section 187(1)(f)

or any unlisted ground analogous to the listed grounds.⁷ In essence, in a claim like the present one, the statement of claim must establish a connection between the differentiation and a listed or an unlisted ground.

[18] The applicant's case as pleaded cannot succeed.

[19] To the extent that the applicant sought to rely on all the above listed incidents collectively as an unlisted ground of discrimination, even though as vaguely pleaded, I deem appropriate to deal with the claim for completeness sake. As stated above, unlisted grounds are considered as acts of discrimination if they are analogous to the listed grounds.⁸ In *Stojce v University of KZN (Natal) and Another*,⁹ the court articulated the test to be applied when considering unlisted grounds of discrimination and stated that:

"The test is that the differentiation must impair the fundamental dignity of people as human beings because of attributes or characteristics attached to them. Not every attribute or characteristic qualifies for protection against discrimination. Smokers, thugs, rapists, hunters of endangered wildlife and millionaires, as a class, do not qualify for protection. What distinguishes these groups from those who deserve protection? The element of injustice arising from oppression, exploitation, marginalisation, powerless, cultural imperialism, violence and harm endured by particular groups or the worth and value of their attributes are qualifying characteristics that distinguish differentiation from unfair discrimination. (Davina Cooper "Challenging Diversity" 2004:3 and Iris Marion Young "Justice and Politics of Difference" (1990) 15–44).

An employee who relies on an unlisted ground as being discriminatory must establish the difference, show that it defines a group or a class of persons and that the difference is worthy of protection. To warrant protection, the applicant must show that the conduct complained of impacts on him as a class or group of vulnerable persons, such as persons with disabilities or family responsibility, or that the conduct is inherently pejorative as a racist or sexist utterance might be."

⁷⁷ *Aarons v University of Stellenbosch* [2003] 7 BLLR 704 (LC) at para 16;

⁸ *Ibid.*

⁹ [2007] 3 BLLR 246 (LC) at para 26 to 27.

- [20] Even though in *Stojce* the court dealt with discrimination within the context of section 6(1) of the Employment Equity Act¹⁰ (EEA), this test is applicable to a case of automatically unfair dismissal in terms section 187(1)(f), particularly where the applicant relies on unlisted grounds.
- [21] Applying the above test in the present case, even if I were to accept that the contention that the applicant was viewed as a problem employee who was challenging her superiors, she failed to show how that is akin to any of the listed grounds. Also, she failed totally to show that she was treated differently relative to one or more employees.
- [22] In view of the above, despite having no onus to prove the reason for her dismissal, the applicant failed to discharge the evidential burden by placing sufficient evidence to show that the dominant or ancillary reason for her dismissal was that the respondent discriminated against her based on one or more of the listed grounds or an analogous ground in terms of section 187(1)(f). Put differently, the applicant has failed to show, *prima facie*, that her dismissal was automatically unfair.
- [23] This matter must then be decided on the basis that the reason for the applicant's dismissal was indeed due to the respondent's operational requirements. In this regard, the applicant challenged the selection criterion that was adopted during the section 189A process. In essence, it was her evidence that if LIFO had been applied, Mr Mlambo would have been the one selected for retrenchment. However, this challenge was abandoned by the applicant's counsel during her closing submissions. In view of that, it is clear that the respondent's reasons for the retrenchment remain unchallenged.

Costs

- [24] I have considered that the applicant is an individual litigant and that she spent a considerable time unemployed. I therefore deem it appropriate that costs should not follow the result.

¹⁰ Act 55 of 1998.

[25] In the circumstances, I make the following order:

Order

1. The applicant's claim that her dismissal is automatically unfair is dismissed.
2. The applicant's dismissal based on the respondent's operational requirements is substantively fair.
3. There is no order as to costs.



P.Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For The Applicant: Advocate S Saunders

Instructed by: Chiba Attorneys

For the Respondents: Advocate A Fourie

Instructed by: Joubert Galpin Searle Attorneys

LABOUR COURT