



Of interest to other judges

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT JOHANNESBURG**

Case no: JS 29/14

In the matter between:

**CHEMICAL ENERGY PAPER
PRINTING WOOD & ALLIED
WORKERS UNION**

First Applicant

MAMPONDO, R & OTHERS

**Second and Further
Applicants**

and

MR IS WILSON t/a ISW PALE

Respondent

Heard: 11 June 2018

Delivered: 12 June 2018

Summary: (absolution from the instance-date of dismissal in dispute-applicants case premised on being dismissed in April 2013-respondent claiming to have dismissed the applicants in May 2017-CCMA referral of dismissal dispute made on 25 April 2013)

RULING ON ABSOLUTION FROM THE INSTANCE

LAGRANGE J

- [1] This is a ruling on absolution from the instance. It arises from an unresolved dispute in an unfair retrenchment claim referred to this court.
- [2] Instead of concerning the merits of the main case, it concerns the narrow issue whether the individual applicants were dismissed on 15 April 2013.
- [3] If they were dismissed on that date, then the court might have jurisdiction to hear their claim because their dismissal would have taken place before their unfair dismissal dispute was referred to the CCMA for conciliation. There would still be other issues to overcome, such as whether the pleading of unfair dismissal for operational grounds could be extended to cover this claim. Alternatively, if they were dismissed on 15 April, it might have been for an unknown reason and this court could refer back to the CCMA to determine that dispute.
- [4] However, if they were not dismissed on 15 April 2013, or at least before 25 April 2013, when the dispute was referred to the CCMA, then the court would not have jurisdiction to entertain a dispute about the dismissal on a later date, because the later dismissal would not have been referred to conciliation which is a prerequisite for a referral to this court in terms of section 157 (4) (a) of the Labour Relations Act 66 of 1995 ('the LRA').
- [5] The dispute about the true date of the dismissal had been an issue between the parties and remained an unresolved issue. In the pre-trial minute, the objection was raised in the form that the statement of claim did not plead the basis on which a dismissal on 15 April 2013 amounted to an unfair dismissal for operational grounds. Indeed, the statement of claim is silent on that issue. At the hearing of the matter, the respondent raised the issue which was implicit in the dispute over the true date of dismissal. The employer contended that the real date of dismissal was 7 May 2013, therefore disputed that a dismissal took place on 15 April 2013. At the outset of proceedings it asked for this point to be determined. As it clearly made more sense to determine this matter beforehand, the union agreed though rightly complaining that this objection could have been more timeously raised. However, as it ultimately affects the court's jurisdiction and was an issue that could be dealt with without hearing all the evidence,

it made obvious sense to dispose of the question whether or not the applicants were dismissed on 15 April 2013 before dealing with other issues.

Application for absolution

- [6] At the end of the evidence of Ms P Machaba, the respondent asked for absolution from the instance, which is the subject matter of this ruling.
- [7] In summary, Ms P Machaba ('Machaba') testified that on 15 April when she and the other five individual applicants reported for work, their names were not read out at the 7 am roll call. She claimed that it was during the roll call that staff were normally allocated to their workstations. Nonetheless, they assumed that their presence was noted and proceeded to their previous workstations where they proceeded to work. However, after the morning tea break had ended at 9.30 AM, they were told by a supervisor that they would not be paid for the work they were doing unless they agreed to be paid on a so-called 'stok' system. In terms of that system, they would be remunerated for the number of bundles of wood they cleaned and packaged rather than receiving a fixed monthly wage.
- [8] On learning this, they stopped working and sought advice from a shop steward, Mr A Gededza. After working hours that day, and in the presence of the individual applicants, he was able to contact a union official on his phone. The advice from the union official, which was undoubtedly correct at the time, was that they should not render services if they were not going to be paid for them. A critical element of this version is that they did no further work since the end of the morning tea time on 15 April 2013.
- [9] Machaba's version was quite at odds with the pleaded version of the applicants. The crux of that version is set out in paragraph 3.5 of the statement of claim:

on Monday, 15 April 2013, when the second and further applicants ordered for duty, Wilson and informed them that they would henceforth be engaged as 'contractors' and be paid on the basis of the number of dropper bundles they were able to produce. The second and further applicants did not agree to this. They requested that the respondent engage with the union on the

proposed new terms of the enquiry advised them on the effects of the changes. They continued working but were placed at a different station from where they usually worked.

[10] Machaba could provide an explanation for the discrepancy between her version and the pleaded version of events on that day and also could not explain why the employer would have offered to pay them for any time worked in May 2013 if they had not done so. She did agree that an offer of payment had been made on 7 May 2013 and the payment offer was one that included, in her case two days wages and leave pay.

[11] The test for granting absolution from the instance is well known. In ***Commercial Stevedoring Agricultural & Allied Workers Union on behalf of Dube & others v Robertson Abattoir***¹ the LAC reaffirmed the general principles applicable to applications for absolution from the instance:

‘Absolution from the instance

[16] It is important to bear in mind that this appeal is based on a grant of an order of absolution from the instance. Accordingly, the test which must be determined is whether firstly there was a dismissal and secondly whether the appellant has provided evidence which raises a credible possibility that the dismissal in question fell within the scope of s 187(1)(c) of the LRA. This approach has been confirmed by this court in *Kroukam v SA Airlink (Pty) Ltd*:

“In my view, s 187 imposes an evidential burden upon the employees to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove to the contrary, that is to produce evidence to show that the reason for the dismissal did not fall within the circumstance envisaged in s 187 for constituting an automatically unfair dismissal .”

[17] This dictum, which sets out the law insofar as unfair dismissals are concerned, should be read together with the general legal position relating to an application for absolution from the instance at the end of the plaintiff’s case. In this connection, the correct approach was set out by Harms JA in *Gordon Lloyd Page & Associates v Rivera & another* as follows:

¹ (2017) 38 ILJ 121 (LAC).

“The test for absolution to be applied by a trial court at the end of a plaintiff’s case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409 G-H in these terms:

‘... (W)hen absolution from the instance is sought at the close of plaintiff’s case, the test to be applied is not whether the evidence led by 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. (*Gascoyne v Paul and Hunter* 1917 TPD at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T)).’

This implies that a plaintiff has to make out a *prima facie* case — in the sense that there is evidence relating to all the elements of the claim — to survive absolution because without such evidence no Court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van de Schyff* 1972 (1) SA 26 (A) at 37G-38A; *Schmidt Bewysreg* 4th ed at 91-2). ... The test has from time to time been formulated in different terms, especially it has been said that the Court must consider whether there is ‘evidence upon which a reasonable man might find for the plaintiff’ (*Gascoyne* (loc cit)) — a test which had its origin in jury trials when the ‘reasonable man’ was a reasonable member of the jury (*Ruto Flour Mills*). Such a formulation tends to cloud the issue. The Court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another ‘reasonable’ person or Court. Having said this, absolution at the end of a plaintiff’s case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a Court should order it in the interest of justice.”²

- [12] Applying the test to the limited evidence canvassed with Machaba, even if her account is accepted, despite not being pleaded, there does not seem to be any evidence that can support the conclusion that the employer terminated the applicant’s employment on 15 April. At best for the applicants, there was a stalemate in which the employer refused to accept the tender of their services except on new terms and they refuse to work except on the old terms. Neither of the parties to the employment relationship purported to accept the conduct of the opposite party as a

² at 126-7.

repudiation of the contract. At that stage, the union's advice which Machaba claims they accepted, was not to work in the absence of being paid remuneration (on the ordinary time based method).

- [13] At the very least, to establish evidence on which a court could conclude that a dismissal had taken place at that stage, either the applicants needed to put the respondent on terms to pay them according to the previous arrangement, failing which they would accept the breach and pursue a claim for unfair dismissal and, or alternatively contractual damages, or alternatively, they needed to lead some evidence of other unequivocal the employer terminating the relationship. On the evidence led, ignoring once again what was pleaded, at best the applicants provided evidence of a potential unprotected lockout.
- [14] In the circumstances, the respondent must be granted absolution because the applicants have failed to produce sufficient evidence on which a Court could conclude that they were dismissed on 15 April 2013. Consequently, they have failed to make out a case that could allow a court to conclude that their referral of an unfair dismissal dispute on 25 April 2013 was not premature and that this court might have jurisdiction, assuming they could also overcome the hurdle limitations of the pleading in relation to the dismissal on that date.
- [15] It is not necessary, specifically to deal with the fact that Machaba's version was materially different from the pleaded version. This is sometimes the regrettable outcome of an imperfect extended chain of communication between union members, the union and their attorneys who are instructed to run a case

Costs

- [16] Although it became apparent on the day that it made sense to consider the question as a necessary jurisdictional one, it could have been raised at a much earlier stage in the somewhat protracted pre-trial wranglings of the parties. In the circumstances, I am not inclined to grant an order of costs to the respondents.

Order

- [1] The respondent is granted absolution from the instance
- [2] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS:

M Makhura of Cheadle,
Thompson & Haysom Inc

RESPONDENT:

H Gerber instructed by
Clarinda Kügel Attorneys

LABOUR COURT