



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS571/16

In the matter between:

NOMALANGA LEDWABA

Applicant

and

LANXESS (PTY) LTD

Respondent

Heard: 14-16 May 2018 and 18, 20, 21, 26 and 27 September 2018

Delivered: 16 October 2018

Summary: A referral in terms of which the applicant alleges that she was automatically unfairly dismissed. An employee who alleges automatically unfair dismissal is required to produce credible evidence showing that he or she has been subjected to an automatically unfair dismissal. Ordinarily, the employer is the one knowing the reason why it dismissed an employee. In *casu*, the respondent states that it dismissed the applicant for operational reasons. The applicant on the other hand alleges that the true reason for her dismissal is that she took action or indicated an intention to take action against the respondent by exercising a right conferred to her by the LRA. An employee must produce credible evidence showing that he or she has been subjected to an automatically unfair dismissal before an employer is behoved to show that the dismissal

is not for a prohibited reason. Held: (1) The applicant was not automatically unfairly dismissed. Held: (2) The dismissal of the applicant is procedurally fair but substantively unfair. Held: (3) The respondent is ordered to pay to the applicant an amount equivalent to eight months' salary. Held: (4) The applicant to pay the respondent's trial costs on a party and party scale.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is a referral in terms of section 191 of the Labour Relations Act¹ (LRA). The applicant alleges that the respondent subjected her to an automatically unfair dismissal within the contemplation of section 187 (1) (d) of the LRA as amended. In the alternative, the applicant alleges that the dismissal was both procedurally and substantively unfair. On the other hand, the respondent disputes that the applicant was subjected to an automatically unfair dismissal. Instead, the respondent contends that the applicant was dismissed based on its operational requirements.

Background facts

[2] The respondent is a legal entity involved in the mining industry. It has its head offices in Germany. The applicant was employed as a Human Resources Manager at the Lanxess Chrome Mine situated in Rustenburg. Given the conflict between the applicant and the Mine's CEO, the applicant was offered and subsequently accepted a new position known as BBBEE Social Projects Manager: (SPM) South Africa (SPM). Due to operational reasons, the SPM was restructured and the position was rendered redundant. Thereafter, the applicant was dismissed after a consultation process. Prior to her dismissal, the applicant had lodged a grievance against Mr Ferreira, the Chief Executive Officer (CEO) of the

¹ Act 66 of 1995 as amended.

Mine, which grievance was not pursued, after the applicant was convinced not to pursue it. Aggrieved by her dismissal, the applicant referred an automatically unfair dismissal dispute and alternatively an ordinary unfair dismissal claim.

Evidence Led

- [3] For some reasons, the parties agreed that the respondent should give evidence first. The respondent tendered evidence of five witnesses. One of the witnesses testified *via* video link from Germany. For the purpose of this judgment, it is not necessary to set out in any details the evidence of all the five witnesses. Suffice to mention that this Court was particularly impressed with the evidence of the respondent's witnesses. They were honest, forthright and straightforward in their testimony. On the other hand, the applicant was the only witness in her own case. The Court was far from being impressed with her testimony. She failed to give direct answers to direct questions. She was at times longwinded even where a question was simple and straightforward.
- [4] In summary, Mr Qodashe testified that as the Head of Human Resources, he represented the respondent during the consultations process. Prior to the consultation process, he was in discussion with the Country Managing Director regarding the reviewing of the applicant's position as a SPM. It was picked up that the centralised role was no longer relevant given the duplication and overlap of functions at the various sites performed by the local managers. He gave account of the consultation meetings that took place between November 2015 up to and including January 2016. Regarding the applicant's previous position at the Mine, he testified that the applicant did not show interest in that position since her departure was acrimonious. When he joined the respondent in August 2015, various positions were restructured. He was part of the team that reviewed the applicant's position as a SPM. He assumed that the applicant did not wish to return to the position of Head of Human Resources at the Mine. Had she raised her hand, she would not have been dismissed. The position was not offered to the applicant

as it was vacant at the relevant time. She was suitably qualified for the position but because she did not raise her hand she was not offered the position.

[5] Mr Strydom had dealings with the applicant. He testified about the minibus request from a particular school. He did not agree with the applicant's objection to lend a support to the school. On 23 October 2015 a meeting took place and the issue of the minibus was discussed. There was a heated exchange between him and the applicant over the issue. The system that was in place before the creation of SPM was more efficient for him. Had he been consulted when the SPM position was created, he would have not agreed to its creation.

[6] Dr Gassen, testifying through video link gave evidence around the three main reasons why the SPM was created. A proper process was followed when the new position was created. At a meeting at the Mine, the position was offered to the applicant and the applicant accepted it. As he was about to leave the company, he discussed with Mr Marais as to how the position would function. He never promised the applicant that she would take over the position of Mr Govender once he, Mr Govender, retires. Given the fact that SPM was his brainchild, he would have opposed its restructuring if he was still employed. He did not pressurise the applicant not to proceed with the grievance. The functions in Mr Govender's position are different and technical in nature, thus, it was impossible to have promised the applicant his position upon retirement.

[7] Mr Ferreira, was employed to turn the Mine around as it was not doing well financially. The applicant was already in the employ of the Mine when he took up the position as the CEO. There was never a good working relationship between him and the applicant. She undermined him and refused to follow his instructions. The relationship between them was "totally broken down". The frustration almost led him to leave his position. He documented his complaints to Dr Gassen and others. He was not aware of any investigation of irregularities conducted by the applicant. In any event there was a prescribed procedure for

investigations, which he was not aware that the applicant had followed. He was not involved in the transfer of the applicant, nor was he aware of the grievance that the applicant lodged against him. He will not be able to work with the applicant, particularly because of the issue of the suspension of Ezekiel.

- [8] Mr Marais is the CEO of the respondent's operations in South Africa and he was part of the process leading to the transfer of the applicant to Greenside. The transfer was prompted by the friction between the applicant and the CEO at the Mine. It was discussed in a meeting and an agreement was reached that Dr Gassen should deal with the transfer process. Following a meeting on or about 18 March 2015, Dr Gassen and Tedesco met with the applicant and gave her an offer which she accepted. It was agreed that the applicant would commence at Greenstone as soon as possible. However, the applicant only reported at the post after 28 April 2015. The issues that held up her reporting related to the benefits attached to the post and the title of the post. Those issues were addressed by Tedesco. He was never part of a discussion where the applicant was promised the position of Mr Govender upon retirement. At a point in time, a conclusion was reached that the SPM was not adding value since there was duplication of functions. The applicant was thus dismissed for operational reasons and not any other reason related to the minibus issue nor the grievance which was not pursued by her.
- [9] The position, SPM was created as an alternative to a possible dismissal at the Mine. The dispute around the minibus was not about roles but about whether the minibus must be bought or not.
- [10] The applicant testified about her qualifications and experience. She performed the functions of Mr Govender before his appointment as head of BBBEE. She was a useful and reliable resource. The new position, SPM, she was appointed to was not advertised as it is the norm to do so. The conflict between her and the CEO of the Mine was sparked by the management and appointment of service providers. She had questioned certain appointments. The CEO initiated and orchestrated industrial

actions aimed at removing her from her post as Human Resources Manager at the Mine. When the new position was discussed with her she was promised the position of Mr Govender when he retires. She only accepted the position on 29 April 2015, when she signed the appointment letter. She accepted the position because she was compelled by Mr Marais. A week after the heated discussion over the minibus issue, she received a section 189 (3) of the LRA notice. In the consultation process, she disputed the redundancy of the position as she was hoping that the position would develop. She suggested that she be taken back to the vacant position of Human Resources Manager at the Mine. The suggestion was brushed off and she was not offered that position. She considered the transfer to SPM as part of the succession plan. She wished to be reinstated. During cross-examination, she conceded that in a conflict situation, an employer is entitled to take steps to address the conflict. Such steps may include transfer and a job offer. Also, she conceded that the respondent knew that the grievance was not being pursued by her anymore.

Argument

- [11] At the conclusion of the evidence, both representatives delivered oral submissions. I however, allowed the representatives to augment the oral submissions in writing. They did so. I considered those submissions for the purposes of this judgment and wish to thank both representatives for the helpful submissions and the collated authorities.

Evaluation

- [12] This is one of those matters where the true reason for the dismissal is being disputed. As pointed out elsewhere in this judgment, the respondent contends that the applicant was dismissed for operational requirements. The applicant contends that the true reason for her dismissal is because she took action by exercising her rights conferred by the LRA.

- [13] Determining the reason or the principal reason of a dismissal is a question of fact. As such, it is a matter of either direct evidence or of inference from the primary facts established by evidence. The reason for dismissal consists of a set of facts, which operated on the mind of the employer when dismissing an employee². They are within the employer's knowledge. The employer knows better than anyone else in the world why it dismissed an employee.
- [14] When an employee positively asserts that there was a different and inadmissible reason for his or her dismissal, he or she must produce some evidence supporting the positive case, such as taking action by exercising rights conferred by the LRA. An employer who dismisses an employee has a reason for doing so. He or she knows what it is and must prove what it is.³

Was the dismissal of the applicant automatically unfair or not?

- [15] In all automatically unfair dismissal instances in section 187, they are preceded with the phrase "if the reason for the dismissal is". What applies is the test set out in *Kroukam v SA Airlink (Pty) Ltd*⁴, which is that, the employee must produce credible evidence that shows that an automatically unfair dismissal has occurred. This I call the first hurdle. Should an applicant fail to cross this hurdle such an applicant must to my mind, fail.
- [16] It is not sufficiently clear what the applicant's case is in this regard. Her pleaded case was that she was victimized for exercising her Constitutional and Statutory rights by, amongst others, reporting irregularities and taking action against senior management, instituting a grievance against the CEO of the Mine, insisting on following procedures and policies and protocol, and/or reporting the unacceptable conduct of

² *Abernethy v Mott, Hay and Anderson* [1974] ICR 323. See also *K Screene v Seatwave Ltd* Appeal No. UKEAT/0020/11/RN delivered on 26 May 2011.

³ See *Kuze v Rouche Products Ltd* [2008] EWCA Civ 380 (17 April 2008)

⁴ [2005] 26 ILJ 2153 (LAC).

Mr. Strydom and escalating her grievance against him to Lanxess: Germany.⁵

[17] It is not her case that she was dismissed because she had made a protected disclosure. In her written submissions, reliance was placed on the decision of this Court in *Mackay v ABSA*⁶. It is therefore apparent that the applicant contends that she was dismissed for having lodged a grievance. The only formal grievance lodged was one against the CEO of the Mine. It is common cause that this grievance was not pursued by the applicant. That being the case, I fail to understand how the respondent can respond with a dismissal against a non-existent grievance. After Dr Gassen convinced the applicant not to pursue the grievance, there was nothing to be worried about. Put differently, the applicant was no longer seeking to exercise the rights conferred by the LRA.

[18] With regard to the roles complaint, the applicant did not lodge a formal grievance. All she did was to inform some employees in Germany of how she views her functions and such employees agreed with her. I do not consider that to be an exercise of a right conferred by the LRA. I do not agree with the applicant's counsel that there was a clear causal connection between the exercise of rights and her dismissal. Therefore, I conclude that the applicant was not automatically unfairly dismissed.

Was the applicant's dismissal procedurally and substantively unfair?

[19] With regard to procedure, the applicant's pleaded case was that of *fait accompli*, failure to provide sufficient information to enable her to meaningfully participate and premature implementation of the decision to retrench. The evidence before me suggests that the applicant was not confronted with a *fait accompli*. No final and immutable decision was arrived at prior to a consultation process. It cannot be said that the consultation process was a sham. It was meaningful. Regarding the issue of sufficient information, this Court was not told what that

⁵ Paragraph 3.1 statement of case.

⁶ [2000] 21 ILJ 2054 (LC)

information was. The provisions of section 16 of the LRA applies in a consultation process. There is no evidence before me that the applicant attempted to invoke the provisions of section 16 of the LRA. With regard to premature dismissal, I fail to understand why such is a procedural irregularity. Accordingly, I am not satisfied that there was any procedural unfairness.

- [20] With regard to substance, the applicant's counsel conceded rightly so that the respondent had commercial rationality. The mandated test is that of fairness as opposed to the correctness of the commercial decision. The obligation to avoid a dismissal based on a no fault reason lies with an employer⁷. Had the respondent offered the applicant the vacant Human Resources Manager position at the Mine, the applicant's dismissal could have been avoided. The assumption that the applicant would have not accepted the offer because of the conflict is not a reasonable assumption to have been made. There is no specific reason shown why the applicant should have applied for the vacant position. There is uncontested evidence that the applicant suggested to be taken back as a measure to avoid her dismissal. What was required was to offer the applicant the vacant position and if she rejects it for any reason, then the respondent would have discharged the obligation to avoid the dismissal. Dismissing the applicant in the circumstances where a suitable position existed is dismissing her for no fair reason. Accordingly, her dismissal was substantively unfair.

The issue of the relief - practicability of reinstatement.

- [21] The applicant testified that she wishes to be reinstated. Reinstatement is a primary remedy. It can only be denied if the provisions of the LRA are met. The relevant section of the LRA in this regard is section 193(2) (c)⁸.

⁷ See *SAA v Bogopa and Others* [2007] 11 BLLR 1065 (LAC) and *Oosthuizen v Telkom SA Ltd* [2007] 28 ILJ 2531 (LAC)

⁸ The Labour Court or the arbitrator must require the employer to re-instate or re-employ the employee unless-

- (a)...
- (b)...

The dictionary meaning of the word 'practicable' means-*capable of being effected, done, or put into practice; feasible*. Reasonable has as its meaning to be *being within the bounds of common sense, not excessive, extreme or fair*.

[22] So to my mind the phrase *reasonably practicable* means that which is effectively fair. An objective value judgment predicated on some evidence is thus required. In *casu*, it is common cause that the position that the applicant held does not exist anymore. Reinstatement means putting back the employee into the same job or position he/she occupied before the dismissal on same terms and conditions.⁹

[23] The position of SPM does not exist anymore. Therefore, it is impracticable to place the applicant in the position. Re-employment is not the same as reinstatement. It is only in a re-employment context that an employee may be placed in other reasonably suitable work. To my mind, for re-employment in such circumstances to be reasonably practicable, there must be a reasonably suitable work. In other words, there must be evidence that a reasonably suitable work does exist. The issue is not whether vacant positions exist to have avoided a dismissal but whether at the time the court considers the relief of re-employment, there exists a reasonably suitable work. Before me, there is no evidence that a reasonably suitable work exists. Accordingly, re-employment is not reasonably practicable as well.

[24] The only available relief is that of compensation. Section 194 (1) of the LRA becomes the guiding section. The LAC has already observed that a determination of what is just and equitable is a difficult horse to ride. I agree. It is instructive to note what the LAC said in *ARB Electrical Wholesalers (Pty) Ltd v Hibbert*.¹⁰ It said:

(c) It is not reasonably practicable for the employer to re-instate or re-employ the employee.

⁹ Equity Aviation Services (Pty) LTD v CCMA & others [2008] 12 BLLR 1129 (CC)

¹⁰ [2015] 36 ILJ 2989 (LAC)

[22] The compensation that an employee, who has been unfairly dismissed or subjected to unfair labour practice, may be awarded is not aimed at making good the patrimonial loss that s/he suffered. The concept of loss or patrimonial loss may play a role to evince the impact of the wrong upon the employee and thus assists towards the determination of appropriate compensation, but compensation under the LRA is a statutory compensation and must not be confused with a claim for damages under the common law, or a claim for breach of contract or a claim in delict. Hence, there is no need for an employee to prove any loss when seeking compensatory relief under the LRA.

[23] Compensatory relief in terms of the LRA is not strictly speaking a payment for the loss of a job or the unfair labour practice but in fact a monetary relief for the injured feeling and humiliation that the employee suffered at the hands of the employer. Put differently, it is a payment for the impairment of the employee's dignity. This monetary relief is referred to as a *solatium* and it constitutes a solace to provide satisfaction to an employee whose constitutionally protected right to fair labour practice has been violated. The *solatium* must be seen as monetary offering or pacifier to satisfy the hurt feeling of the employee while at the same time penalizing the employer. It is not however a token amount hence the need for it to be "just and equitable" and to this end salary is used as one of the tools to determine what is "just and equitable".

[24] The determination of the quantum of compensation is limited to what is "just and equitable". The determination of what is "just and equitable" compensation in terms of the LRA is a difficult horse to ride...In my view, and as I said earlier, because compensation awarded constitutes *solatium* for the humiliation that the employee has suffered at the hands of the employer and not strictly a payment for a wrongful dismissal, compensation awarded in unfair dismissal or unfair labour practice matters is more comparable to a delictual award for non-patrimonial loss. While a delictual action...for non-patrimonial loss is fashioned as a claim for damages, it is no more than a claim for a *solatium* because it is not dependent upon patrimonial loss actually suffered by the claimant. Hence, awards made under a delictual claim for non-patrimonial loss may serve as a guide in the assessment of just and equitable compensation under the LRA. In *Minister of Justice &*

Constitutional Development v Tshishonga, this court in an award of solatium referred to a delictual claim made under the *actio iniuriarum* for guidance in what would constitute just and equitable compensation for non-patrimonial loss in the context of an unfair labour practice. It stated that since compensation serves to rectify an attack on one's dignity, the relevant factors in determining the quantum of compensation in these cases included but not limited to:

"...the nature and seriousness of the iniuria, the circumstances in which the infringement took place, the behaviour of the defendant (especially whether the motive was honourable or malicious), the extent of the plaintiff's humiliation or distress, the abuse of the relationship between the parties, and the attitude of the defendant after the iniuria had taken place..."

[25] The above *dictum* should serve as an appropriate guideline in determining what is just and equitable compensation that can be awarded under s 194 (3) of the LRA'.

[25] In the circumstances of this case, it is clear to me that the respondent laboured under an impression that the applicant would not be interested in measures aimed at avoiding her dismissal. Granted, that impression was wrong. It was probably reasonable for the respondent to have made that assumption, but such did not exonerate it from the duty to avoid the dismissal. Given the undisputed conflict between the applicant and the CEO at the Mine, it may not be unfair to assume that even if the applicant was offered the position, she may have been dismissed shortly thereafter. There is no doubt in my mind that the conflict would have continued perhaps to a point of incompatibility. With that in mind, what I consider to be just and equitable is an amount equivalent to eight months' salary as compensation.

[26] I now turn to the issue of costs. Section 162 of the LRA guides me. One of the factors to be taken into account is the conduct of a party in proceeding with or defending a matter. The respondent had prior to the commencement of the trial made an offer to pay to the applicant compensation equivalent to 12 months' salary. The offer was rejected by

the applicant. Rule 22A (7) provides that an offer may be taken into account in making an order for costs. Had the applicant accepted the offer, the trial costs would have been avoided. The applicant failed in her quest for an automatically unfair dismissal and did not obtain a higher compensation than the one offered. Accordingly, in fairness, the respondent is entitled to its costs. Proceeding with the matter in the face of maximum compensation offer, is, to my mind, frivolous and vexatious. I am not persuaded that the respondent is entitled to punitive costs. Therefore, I am minded to make an order as to costs.

[27] In the results, I make the following order:

Order

- 1 The dismissal of the applicant is not automatically unfair.
- 2 The dismissal of the applicant is procedurally fair but substantively unfair.
- 3 The respondent is ordered to pay to the applicant an amount equivalent to eight months' salary as compensation.
- 4 The applicant is to pay the respondent's trial costs.

GN Moshwana,

Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Advocate L Nowosenetz

Instructed by : Bester Rhodie Attorneys, Irene.

For the Respondent : Mr P Fouche of Fasken (incorporated in South
Africa as Bell Dewar Inc)

LABOUR COURT