

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JS 727/2017

In the matter between:

FEDCRAW

First applicant

ALFRED MAHLATSI AND 2 OTHERS

Second to fourth applicants

And

JANE FURSE BUILDERS SUPPLY CC

Respondent

Heard: 29 and 30 November 2018

Delivered: 18 April 2019

Summary: Reason for dismissal – misconduct – applicants conceded to the incidents that led to the charges and consequent dismissal – automatically unfair dismissal claims in terms of section 187(1)(d) of the LRA was unsubstantiated – no lawful union activities.

JUDGMENT

NKUTHA-NKONTWANA. J

Introduction

[1] In this matter, the first applicant Federal Council of Retail and Allied Workers (FEDCRAW) alleges that the respondent, Jane Furse Builders Supply CC, victimised and dismissed its members; Mr Alfred Mahlatsi (Mr Mahlatsi), Mr Amos Phasha (Mr Phasha) and Mr David Mokoatjane (Mr Mokoatjane) who are the second to fourth applicants (applicant employees) respectively. FEDCRAW's main claim is that the applicant employees' dismissal was automatically unfair in terms of section 187(1)(d) of the Labour Relations Act (the LRA)¹ as they were dismissed for being trade union members and for participation in the lawful activities of the trade union.

[2] The respondent's case, on the hand, is that the true and real reason for the dismissal of the applicant employees is that they were found guilty of misconduct.

¹ Act 66 of 1995, as amended.

Background facts

[3] FEDCRAW had been organising the respondent's employees since 2015. At some stage it had a membership of 25% of the total number of the employees in the employ of the respondent. The respondent accordingly afforded FEDCRAW basic organisational rights in terms of section 12 and 13 of the LRA. As such, it had access to the respondent's workplace and the respondent deducted union subscriptions and levies on its behalf.

[4] It was the respondent's evidence that, when FEDCRAW membership dropped to 22% of its total workforce, the basic organisational rights were withdrawn. FEDCRAW was duly notified of that fact on 20 March 2017 and the withdrawal of organisational rights was effected on 1 April 2017. This evidence was never disputed.

[5] On 11 April 2017, the applicant employees were dismissed for misconduct. Mr Mahlatsi was charged as follows:

2.1 Making false statement in that on 03-03-2017, 04-03-2017, 05-03-2017, 06-03-2017, 07-03-2017 and 08-03-2017 you claimed to have checked your truck in terms of the company checklist for delivery vehicles, however no physical check was made.

2.2 Alternatively, Gross Negligence in performance of your duties in that you failed to properly check your vehicle on 03-03-2017, 04-03-2017, 05-03-2017, 06-03-2017, 07-03-2017 and 08-03-2017 in terms of the rules of the company.

2.3 Gross Negligence in the performance of your duties in that you allowed an assistant to check the delivery vehicle on your behalf, which conduct is not allowed.'

[6] Messrs Pasha and Mokoatjane were charged as follows:

2.1. Gross Negligence in the performance of your duties in that on 05-03-2017 you started/operated the delivery vehicle without having licence or authority to do so.

2.2 Alternatively, Misuse of company property in that on 05-03-2017 you started/operated the delivery vehicle without having a licence or authority to do so.'

- [7] The applicant employees did not challenge the contents of their charge sheets or sought further particulars during the disciplinary hearing. In fact, Mr Thabo Magatla (Mr Magatla), the respondent's Manager: Human Resources, testified that the incidents referred to in the charge sheets were captured in a video clip that was produced during the disciplinary hearing.
- [8] The applicant employees conceded that the incidents did take place. Their defence was that it was an established practice within the respondent to allow the assistant drivers to help out by checking the trucks. However, this was disputed by the transport manager, Mr James Moloto (Mr Moloto). Mr Moloto testified that the applicant employees had been verbally warned for the same transgressions previously. He was adamant that the assistants were not allowed to drive the trucks even if they had a valid driver's licence.

Legal principles in relation to automatically unfair dismissals

- [9] In order to determine whether the dismissal was automatically unfair, one must establish the real reason for the dismissal of the applicant employees. In terms of section 187(1)(d) of the LRA, a dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is:

'(a)-(c) ...

(d) that the employee took action, or indicated an intention to take action, against the employer by –

(i) exercising any right conferred by this Act; or

(ii) participating in any proceedings in terms of this Act.'

[10] 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 terms of 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. In *Kroukam v SA Airlink (Pty) Ltd*,² the LAC per Davies AJA, (as he then was), stated that:

‘In my view, s187 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 s187 for constituting an automatically unfair dismissal.’

[11] When examining whether an automatically unfair reason was the “dominant” or “more likely” reason for the dismissal of the employee, the test is one of causation. Both factual and legal causation must be satisfied.³

Analysis

[12] Applying the test of factual causation (the 'but for' test) in this case, to succeed in their claim, the applicant employees must at least show that they were victimised for exercising any right to participate in FEDCRAW's lawful activities in contravention of sections 4 and 5 of the LRA.⁴

[13] In this instance, it is common cause that the applicant employees were not shopstewards. Mr Themba Mthembu (Mr Mthembu), FEDCRAW official and organiser, testified that the applicant employees were organisers and hence they were targeted. Consequent to their dismissal, the union membership dropped drastically, so he further testified. In fact, the whole applicants' case is hinged on the allegation that the respondent is anti-trade unions and did all in

² (2005) 26 ILJ 2153 (LAC) at para 28.

³ *SA Chemical Workers Union and others v Afrox Ltd* (1999) 20 ILJ 1718 (LAC) at para 32.

⁴ Section 4(2)(a) states that every member of a trade union has the right, subject to the constitution of that trade union to participate in its lawful activities. Section 5(1), on the other hand, states that no person may discriminate against an employee for exercising any right conferred by the LRA.

its powers, including the dismissal of the applicant employees, to rid itself of FEDCRAW.

[14] However, the respondent's evidence demonstrated clearly that FEDCRAW was not the first nor the last trade union to organise its employees. Its successor, UCEMESHAWU, has since gained the basic organisational rights. Clearly, the allegation that the respondent is anti-trade unions has no substance. Mr Magatla testified that Mr Mthembu's last visit at the respondent's premises was seven months prior to the dismissal of the applicant employees. It is not surprising that FEDCRAW membership declined to an extent that it lost the basic organisational rights.

[15] I find it strange that the applicant employees would accuse the respondent of victimisation for union activities when they were not even shopstewards. It was Mr Magatla's undisputed evidence that Mr Mthembu had introduced to him two gentlemen, Leshoka and Collins, as FEDCRAW shopstewards. In any event, there could not have been any recognised union activities as FEDCRAW was not a majority trade union and by the time the applicant employees were charged it had lost even the basic organisational rights because its membership was declining.

[16] To my mind, the applicants' claim suffered its demise the moment they conceded to the incidents that led to the applicant employees' charges and dismissal. Therefore, there is no merit in the applicants' submission that the charges were trumped-up. I am persuaded that the real reason for the applicant employees' dismissal is that they were found guilty on charges of misconduct.

Conclusion

[17] In view of the above, the applicants failed to discharge the evidential burden by placing sufficient evidence to show that the dominant or more likely reason for the dismissal of the applicant employees was that they were victimised for participating in FEDCRAW's lawful activities. Put differently, they failed to prove a case of an automatically unfair dismissal in terms of section 187(1)(d) of the LRA.

Costs

[18] There is no reason why FEDCRAW should not pay costs. It pursued an automatically unfair dismissal claim which was patently unmeritorious. I also took note of the fact that there is no collective bargaining relationship between FEDCRAW and the respondent, of which a costs order would offend.

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

Order

1. The applicants' automatically unfair dismissal claim is dismissed with costs.

P. Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr Jan Nel

Union official from: FEDCRAW

For the Respondents: Advocate RG Beaton SC

Instructed by: De Villiers & Du Plessis Attorneys