

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

Case Number: D424/97

In the matter between

Applicant

and

Respondent

JUDGMENT

Maserumule AJ

- 1 The Applicant seeks an order declaring his alleged retrenchment by the Respondent to be unfair, and payment of compensation.
- 2 The Respondent has pleaded, firstly, that the Applicant was not an employee as defined by the Labour Relations Act No. 66 of 1995 (“the Act”) and, secondly, that even if he was an employee as defined in the Act, his dismissal was not

unfair.

- 3 In support of his contention that he was an employee, the Applicant, in addition to giving evidence himself, led the evidence of four witnesses. These were the employee of the placement agency which placed the Applicant with the Respondent, the Respondent's former book-keeper and two other former employees of the Respondent.
- 4 The evidence establishes that the Applicant worked for the Respondent as a Project Manager. He was paid a monthly salary by the Respondent but no deductions were made from his salary in respect of Pay As You Earn (PAYE) or Unemployment Insurance Fund (UIF). He was also provided with a company car and a garage card and used the car for both business and personal purposes. Likewise, all other employees of the Respondent, including the book-keeper whose status as an employee was not challenged, had no deductions made in respect of PAYE and UIF. The Applicant was answerable to the Respondent's directors and took instructions from them.
- 5 The Respondent sought to rely on the fact that deductions were not made from the Applicant's salary in respect of PAYE and UIF, that the nature of Applicant's job did not require constant supervision, and a requirement for the Applicant to submit invoices for its contention that he was not an employee, but an independent

contractor. It was, however, undisputed that for seven months leading up to his departure, the Applicant did not submit invoices but was nevertheless paid his monthly salary.

6 On the evidence available, I have no hesitation in concluding that the Applicant was an employee as defined in the Act. In reply to the Applicant's Statement of Case, the Respondent pleaded that "an oral agreement was reached between the Applicant and the Respondent on 1 September 1997 whereby the Applicant would be retrenched ...". The Respondent also pleaded that "[t]he Applicant commenced employment with the Respondent in March 1996", that the Respondent met with the Applicant to discuss "the possibility of retrenchment" and that the Applicant and Respondent entered into an oral agreement "whereby the Applicant would be retrenched" (own underlining).

7 No attempt was made by the Respondent's only witness, Mr Nicholas Wentzel, to explain why its plea was formulated as above if the Applicant were an independent contractor and not an employee. Neither did the Respondent amend its plea prior to or during the hearing. Taken together with the Applicant's evidence, and that of his witnesses, it is clear that the special plea relating to absence of jurisdiction on this basis was an afterthought and a not too subtle attempt by the Respondent to avoid having to answer the Applicant's claim that he was unfairly retrenched. The Respondent's deplorable and unlawful conduct in not

making deductions required by law from its employees' salaries cannot change the nature of the true status of the Applicant and, for that matter, of its other employees. I therefore conclude that the Applicant was an employee as defined in the Act and the Court has jurisdiction to adjudicate his dispute with the Respondent.

8 I now turn to deal with the merits of the allegation by the Applicant that he was unfairly dismissed because the Respondent did not consult with him in the manner required by section 189 of the Act.

9 Both the Applicant and Mr Wentzel gave evidence about the circumstances which led to the present dispute. The evidence will be referred to cumulatively, save where disputes exist. In the latter event, I will refer to each witness's version of what occurred insofar as it may be necessary.

10 The Respondent's principal business was that of project management in the engineering field, which was done on a consultancy basis. It charged a fee for overseeing projects carried out at its client's businesses.

11 The Respondent began experiencing financial difficulties in early August 1997, primarily as a result of the failure of a company called Thermosil to pay a debt of R1.2 million to the Respondent. As a result, meetings were held with employees

about the problem. All other employees were informed that they would be retrenched. The Applicant, however, was assured that his position was secure as he still had projects to complete, but was requested to propose a different remuneration structure which would take into account Respondent's cash flow problems.

12 Mr Wentzel testified that on 26 August 1997, one of the Respondent's clients, David Whiteheads, cancelled its contract which simply made the Respondent's position worse. On the same day, Mr Wentzel briefly discussed the consequences of the cancellation of the contract with the Applicant, and he testified that he thinks that at the time of the discussion they both (i.e. Wentzel and the Applicant) realised "that the inevitable was that he [the Applicant] would not have any more employment as of that day". A letter of possible retrenchment was then issued the next day, inviting the Applicant to make written representations regarding the possible retrenchment.

13 On 29 August, the Applicant was informed that he would not be paid his salary for the month, due to insufficient funds in the Respondent's bank account. What happened thereafter is in dispute, but it appears that the Applicant and Mr Wentzel met on 1 September and attempted to resolve the crisis. What is clear from the evidence is that both sides made proposals with certain preconditions, but no agreement was reached.

14 On 4 September, the Applicant referred a dispute about his alleged unfair retrenchment to the Commission for Conciliation, Mediation and Arbitration for conciliation. The dispute could not be resolved and was referred to this Court for adjudication.

15 The Applicant and the Respondent have agreed, as recorded in the pre-trial minute, that the date of the applicant's dismissal is 2 September 1997. The Applicant earned, in total, R10 000.00 per month, made up of a salary of R6 500.00, and a car allowance of R3500.00, inclusive of insurance, petrol and maintenance costs.

FINDINGS

16 The evidence establishes that in early August, when the Respondent consulted with its other employees with a view to their possible retrenchments, the Applicant was dealt with separately as his position was not under threat. He was in fact assured that his position was secure.

17 It is also clear from the evidence of Mr Wentzel that up until 26 August, the Respondent did not contemplate retrenching the Applicant. The only issue under consideration, which arose prior to the meeting of 26 August, was the

restructuring of his remuneration package.

18 According to Mr Wentzel, it was only on 26 August that it became clear that the Applicant would have to be retrenched, hence the letter of 27 August. It is also clear that the situation deteriorated badly over the next two days, mainly because of the Respondent's inability to pay the Applicant his August salary. The result was that no meeting at which a genuine attempt to reach consensus could be held. The only discussions which took place were on 1 September 1997, but these centred on an attempt to agree on a severance package, as by then the Respondent had decided to retrench the Applicant.

19 That the Respondent was in financial difficulties is not in dispute, and the Applicant conceded this fact in his evidence. It is also equally clear from the evidence of the Applicant and Mr Wentzel that the process of seeking to reach consensus did not even get off the ground.

20 As Mr Wentzel said, by 26 August he had decided that the Applicant had to be retrenched. There had been no consultation with the Applicant as, up until then, it had not been intended that he would be retrenched. It follows that the letter of 27 August inviting the Applicant to make written representations on his possible retrenchment was not written in a *bona fide* attempt to reach consensus as required

by the Act (Cf. *Johnson & Johnson v Chemical Workers Industrial Union* 1998 (12) BLLR 1209 (LAC)).

CONCLUSION

- 21 I conclude that the dismissal of the Applicant by the Respondent on 2 September 1997 was not preceded by consultations conducted in a *bona fide* attempt to reach consensus on the issues set out in s189(2) of the Act. I accordingly find that the dismissal of the Applicant was unfair because the Respondent did not follow a fair procedure prior to the dismissal, which was, on the available evidence, necessitated by its operational requirements arising out of severe cash flow problems.

RELIEF

- 22 It is my view that the Respondent's breach of its obligations arising from s189 of the Act was sufficiently serious to warrant an exercise of my discretion in favour of the Applicant in respect of the payment of compensation.
- 23 Following the failure of conciliation to resolve the dispute, the Applicant initially referred his dispute to the CCMA for arbitration. The arbitration took place on 18 November 1997. The Commissioner ruled that the CCMA had no jurisdiction to

arbitrate the dispute and that it had to be referred to this Court for adjudication. The referral was made on 10 December 1997. This caused a delay of about a month, for which the Respondent cannot be held responsible. In calculating the compensation due to the Applicant, a month will be deducted from the total period.

24 The Applicant was dismissed on 2 September 1997. This hearing was concluded on 30 October 1998. The period between the date of dismissal and the last day of the Court hearing adds up to 13 months and 26 days. From this a month is to be deducted, for the reasons furnished above, leaving a total of 12 months and 26 days.

25 Section 194(1) of the Act sets out the formula for the calculation of compensation. The subsection does not prescribe the maximum permissible compensation. On the other hand, s194(2) limits compensation to a maximum of 12 months' pay where a dismissal was not for a valid reason. The question that arises is whether compensation under s194(1) can exceed the 12 month limit set out in s194(2).

26 In my view, the limitation in s194(2) applies equally to compensation payable under s194(1). The reference in s194(1) to compensation which is to be "not less than the amount specified in subsection (1), and not more than the equivalent of 12 months' remuneration" (my underlining) clearly contemplates that the

compensation payable under s194(1) can never exceed that payable under s194(2).

The present case is, however, an example of an unexpected difficulty, where the period used for calculating compensation in section 194(1) is in fact more than the maximum prescribed by s194(2).

27 I do not believe that it was intended to afford an employee whose dismissal is unfair only because of unfair procedure more compensation than an employee whose dismissal was without a valid reason. To interpret s194(1) differently from what is set out herein would undoubtedly lead to an absurdity which could not have been intended by the legislature.

28 If compensation under s194(1) were to exceed the equivalent of 12 months' remuneration, s194(2) would not make sense, in particular, the portion of the section underlined above. In my view, s194(1) must, in a case like the present, be read in the context of the whole section on compensation, including s194(2).

29 Clearly, it must have been within the contemplation of the drafters of the Act that disputes would be arbitrated or adjudicated within a reasonable time and certainly within a period of twelve months from the date on which they arose. At least, this is what a reading of ss194(1) and (2) suggests, and that is how the section should be interpreted.

30 Sections 194(1) and (2) obviously require amendment to remove the apparent ambiguity. Until this is done, the Court is required to interpret the Act in a manner consistent with its purpose.

31 It follows that in the present matter, compensation payable to the Applicant cannot exceed the equivalent of 12 months' remuneration. The order that I make is accordingly as follows:

31.1 The Respondent is ordered to pay to the Applicant compensation equivalent to 12 months' compensation;

31.2 In calculating the payment in 29.1, the Applicant's remuneration is to be taken as R10 000.00 per month;

31.3 The total amounts, less lawful deductions, will bear interest at the legal rate from date of this judgment to date of payment;

31.4 I make no order as to costs.

Maserumule AJ

Judge of the Labour Court

OF HEARING: 14 September, 30 October 1998

OF JUDGMENT: 12 February 1999

e Applicant: In Person

e Respondent: Mr C Haralambous of Francois Medalie Inc