

IN THE LABOUR COURT OF SOUTH AFRICA
(Held at Johannesburg)

Case No : J 789/99

In the matter between :

SOUTH AFRICAN CHEMICAL WORKERS' UNION

First Applicant

S MCHUNU AND OTHERS
Applicants

Second to Further

and

SENTRACHEM

Respondent

REASONS FOR JUDGMENT

Revelas J

- 1] The second and further applicants (“the individual applicants”), all members of the first applicant, brought an application on an urgent basis to this court on 4 March 1999, seeking an order that, pending the final resolution of the dispute between the parties pertaining to the individual applicants’ retrenchment on 29 January 1999, the individual applicants be reinstated in the respondent’s employ, on the same terms and conditions as existed prior to their termination of employment.

Further relief was sought to the effect that the aforesaid relief, operated as an interim interdict.

2] The applicants contend that :

The retrenchment of the individual applicants was unfair because the respondent committed a flagrant breach of section 189 of the Labour Relations Act, No 66 of 1995 (“the Act”), in that it failed to consult in the sense contemplated by the Act and good relationship practices, with the applicants at the time when the dismissal of the individual applicants was first contemplated and that the respondent failed to consult before the decision to retrench was taken;

3] The respondent failed to attempt to reach consensus with either the first applicant or the individual applicants on issues identified on section 189(2) of the Act and the respondent also failed to disclose in writing all relevant information, and that such consultation as did take place was a “sham”;

4] As of 18 September 1998 the respondent did engage in what it termed consultation with the first applicant in regard to the retrenchment of the individual applicants;

5] The “so-called consultations” which began on 18 September 1998 and continued through to 25 January 1999 were neither “bona fide”, nor fair, because by the time the consultation process began, the respondent had already

unilaterally and in the absence of consultation, taken all the decisions that led to the dismissal of the employment of the second to further applicants.

- 6] The applicant also relied on the fact that the fleet of trucks owned by the respondent intended for the purposes of carrying out the functions of the transport division of the respondent, was allowed by the respondent to age and that the respondent then unilaterally decided not to replace the fleet and not to spend available capital on the upgrading of the fleet.
- 7] According to the applicants, the respondent also made a unilateral decision to out-source the transport function of the respondent and also unilaterally took a decision to invite tenders for the purchase of the transport function and to appoint Imperial Tanker Services as an independent contractor.
- 8] The applicants believe they are entitled to *status quo* relief and contend that they have made out a *prima facie* case in their founding papers. They argued that *status quo* relief ipso facto urgent, because *status quo* relief not only contemplates, but has the express purpose of restoring the *status quo ante* of unfairly dismissed employees so that at conciliation proceedings, they may negotiate with their employer on equal terms.
- 9] As a result of the termination of the individual applicants' employment, they have lost their medical aid benefits, which they argue, constitutes a cogent and accepted ground for urgency. In this regard I was referred to two employees who were amongst the individual

applicants, who suffered from diabetes related disorders and who required permanent medical attention.

10] The respondent argued that the relief sought by the applicant is not competent, and that the matter was not urgent. The respondent relied, *inter alia*, on the judgment in *Fordham v O K Bazaars 1929 Ltd (1998)19 ILJ 1156 (LC)*. where I held that parties to a labour dispute were obliged to follow a conciliation process, and if they were unable to resolve their differences through that process their dispute should be adjudicated or arbitrated depending on its nature. I declined to give a *status quo* order reinstating the applicant, pending conciliation of the dispute.

11] The applicants relied on the judgment of Mlambo J in the *University of Western Cape Academic Staff Union and others v University of the Western Cape* case number C 645/98 (unreported).

12] In the *Fordham* case, I held that the legislature did not intend to create a *status quo* procedure as was the position in terms of section 43 of the previous Labour Relations Act, 28 of 1956, (“the 1956 Act”)since I am of the opinion that the omission of such a procedure from the current Act was deliberate.

13] In the *University of the Western Cape Academic Staff Union* case, Mlambo J held that because the Labour Court was established as a court of law, equal in status to a provincial division of the High Court, it must mean that the power given to the Labour Court to grant urgent interim relief, is not dissimilar to the

power of the High Court to grant urgent interim relief. The absence in the Act of a provision similar to section 43 of the 1956 Act, according to Mlambo J, does not mean that the Labour Court lacks the power to grant urgent interim relief in dissimilar cases. Mlambo J went further in stating that his view was that the Labour Court will be failing in its stated task if it were to deny *status quo* relief in circumstances where the unfairness sought to be prevented, is very glaring.

- 14] In the *University of the Western Cape* matter, Mlambo J emphasises that the Labour Court should apply the same standards as the High Court when granting interdicts and warns that because of the controversial nature of the power under section 158(1)(a)(i) of the Act, the Labour Court should be very cautious in the exercise of such a power, and more so in dismissal cases where there are specific provisions aimed at dealing with dismissal disputes. These provisions he says, should not be rendered ineffectual by the granting of relief in terms of section 158(1)(a)(i) and made reference to the matter *Vela & Others v Savo and Others (1998)19 ILJ 916(LC)* where the court cautioned against applicants attempting to conduct a trial by way of urgent application, which in my opinion, is exactly what the applicants in this matter are attempting to do.

- 15] With regard to the question of irreparable harm, if interim relief is not granted and the ultimate relief is granted, Mlambo J found that

loss of income as a result of dismissal is an inevitable consequence of a dismissal as such provides no good grounds for granting interim relief. He further says, and I agree with him, that special circumstances must be advanced to persuade a court to oblige.

16] In *Kgethe v LMK Manufacturing (1998)* 19 ILJ 542 (LAC) Kroon JA held as follows:

“if in fact a transfer of as a going concern had been effected, the appellant will be entitled to the benefit accorded to them in terms of section 197 as they will be entitled to reject any other benefits which either of the respondents sought to accord in lieu thereof. In the event of non-recognition by the respondent’s of the first mentioned benefit and an instance that the last mentioned be accepted, the appellants could, in terms of section 158(1)(a)(iv) approach the Labour Court for an appropriate declarator.

If on the other hand, no transfer as going concern was effected, but the effect of all that transpired was a transfer of contract of employment of the applicants without their consent - and on the evidence that possibility cannot be excluded - such transfer could have fallen foul of the provisions of section 197. Again if need be, the appellants can approach the Labour Court for the appropriate declarator.”

17] In *Paledi v Botswana Broadcasting Corporation*(LC) dated 21

February 1998 under case number J 323-324 1998 reported in 3, 4 Labour Law Digest 184, the Labour Court held as follows:

“The Labour Court has the exclusive jurisdiction to grant temporary relief ancillary to the relief which could be sought in the CCMA in an appropriate case where the employees are entitled to accommodation supplied by their employer: and they will suffer harm and prejudice if this is not granted; and the balance of convenience is in

their favour. In such circumstances the court would be justified in terms of the Act to come to their relief on a temporary basis.”

It is quite plain that there certainly would be circumstances where the Labour Court would grant urgent interim relief.

18] I do not believe that there is any difference between the views held by Mlambo J and myself. The *Fordham* judgment does not have the result that interim relief can never be granted by the Labour Court, but emphasises the reluctance of the Labour Court to grant *status quo* relief in dismissal matters, in other words, reinstatement of dismissed employees, when there are alternative remedies available.

19] Mr Buirski, who appeared on behalf of the applicant, referred me to a judgment of De Kock SM in the matter of *Blair v STC Business Communications (Pty)Ltd* (1991) 12 ILJ 629(IC) at 634(A)-(E) where it was held that the loss of medical aid cover *per se* established urgency under section 17(11)(a) of the 1956 Act. In this matter the circumstances were very different from the case before me. The *Blair* decision was given when the 1956 Act was applicable and *status quo* relief was available to the applicant in terms of section 43 of that Act, which was simply expedited, due to special circumstances.

20] In my view, a medical aid benefit, *per se*, does not establish special circumstances. Virtually all employees, particularly those employed by large

companies, are members of a medical aid fund. A medical aid benefit is often obtained on the same basis as the general remuneration package of an employee. Loss of income, probably the worst consequence of dismissal, is not a ground for urgency. Therefore it is difficult to understand the argument, that a loss of a medical benefit *per se*, is a ground for urgency.

21] If interim reinstatement may be granted on the ground that medical aid benefits are lost to employees as a result of their dismissal, it would be very unfair on an employer, in my view, if the dismissal was for a fair reason, and the employer is obliged to pay medical aid contributions from the time of dismissal until the time when dismissal is found to be fair by the Labour Court. I am of the opinion, that there may be some circumstances where the loss of a medical aid benefit could be extremely prejudicial, eg, where the employee's death is foreseen, and could then form grounds for urgency, but in the present matter I am not persuaded that the mere loss of a medical aid benefit entitles the applicants to the relief they seek.

22] I have sympathy for the two employees who have diabetes related complications, but they have not demonstrated, with sufficient particularity, the urgency inherent in the circumstances of their medical condition.

23] There is an alternative remedy open to the applicants, namely adjudication. As far as the balance of convenience is concerned, Mr Buirski attempted to persuade me that the sooner the retrenchment process is started

again, the better the chances are that any harm done can be undone. On the other hand, the respondent argued that temporary reinstatement would have the respondent “over a barrel” during the conciliation process. Having found that there is an alternative remedy open to the applicants, namely adjudication, I am not persuaded that the balance of convenience favours the applicants.

24] The applicants’ case on urgency seems to be that status quo relief is always a matter of urgency. I do not agree. I believe that the applicants waited unnecessarily for a period of over a month to approach this court to have their dismissals set aside. On their own version, they knew of possible retrenchments as early as September 1998. I consequently find that the matter is not urgent and on this basis alone the application should fail.

25] For all the aforesaid reasons, the application was dismissed with costs.

E REVELAS

For the applicant
Advocate Peter Buirski

Instructed by ROUTLEDGE-MODISE

For the respondent
Advocate Craig Watt-Pringle
Instructed by BELL DEWAR & HALL

This Judgment is also available on the Internet at website:

<http://www.law.wits.ac.za/labourcrt>