

SOUTH AFRICA / JUDGMENT

AMCU obo Phele and Others v BDM Management (Pty) Ltd and Another (JR2223/2014) [2016] ZALCJHB 424 (4 November 2016) [2016] ZALCJHB 424

COURT

Labour Court Johannesburg

BEFORE

E Molahlehi

CASE / FILE NUMBER

JR2223/2014

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JR 2223/2014

In the matter between:

AMCU OBO PHELE, M AND 16 OTHERS Applicants

and

BDM MANAGEMENT (PTY) LTD 1st Respondent

BDM PROJECTS (PTY) LTD 2nd Respondent

HEARD: 10 June 2016

DELIVERED: 4 November 2016

SUMMARY: Effective date of cancellation of the employment contract – the respondent sending only the cover page in relation to the notice – employer contending that summary dismissal date when covering faxed page was received by the union

Molahlehi J

Introduction

- [1] In this matter, which was presented by way of a stated case, the applicants are seeking an order that the respondents should pay them their outstanding salaries between the date of the disciplinary hearing and the date of dismissal. The individual applicants (the employees) represented by AMCU (the union), claim that the respondent owes each one of them 52 days unpaid wages.
- [2] The respondent's statement of opposition was filed late and accordingly have applied for condonation for such late filing. The opposing statement of claim was 4 days late. In my view taking into account the degree of the lateness and the explanation proffered by the respondents, I see no reason why the delay should not be condoned.
- [3] As indicated above the matter was presented by way of a stated case. In addition to the agreed facts and the issues to be determined, the parties agreed that the proceedings shall be conducted in the following manner:
- a. Whether the cover page of the outcome of the disciplinary enquiry which had been faxed to the union constitutes proper notification of the outcome of the disciplinary enquiry and effective termination of the employment contracts of the employees
 - b. Whether the employees' employment contracted were terminated on 30 January 2012 or on 26 March 2012.
 - c. Whether the Employees are entitled to remuneration up until 26 March 2012.
- [4] The respondent abandoned the point about the right of the union to represent the six other employees which it had contended that the union had failed at the CCMA to show that they were its members.[1]

The manner in which the proceedings are to be conducted.

- [5] The parties agreed that the proceedings should be conducted in the following manner:
1. The documentation referring to in the stated case may serve as evidence before this court.
 2. Given the nature of the issues for determination on the merits, the parties do not intend presenting further evidence on the merits, and will present argument to the court on the merits.
 3. With regard to the separation of issues the following is to apply:
 - 3.1 the merits are to be dealt with on the basis of the contents of this stated case; and
 - 3.2 in the event of the merit being determined in the union's favor, the quantum to be dealt with on the bases of the pleadings and pre-trial conference minute.

Background

facts

[6] The individual applicants in this matter are former employees of the respondent. They were dismissed for participating in an unprotected

strike action. They were in this regard, prior to their dismissal, placed on suspension with pay commencing 12 January 2012. The issue of whether or not the suspension was uplifted is the subject matter determined later in this judgment.

[7] The disciplinary action against the employees was scheduled for 26 January 2012. They did not attend the hearing on that day and

accordingly the decision to terminate their employment contract was taken in their absence.

[8] The decision to terminate the employment contract of the employees was apparently taken on 30 January 2012 and on that day a fax covering page was sent by the respondent to the union. From the perspective of the respondents the fax covering page was intended to have included the notice of termination of the employment contract of the employees.

[9] Aggrieved by the decision to dismiss them, the employees assisted by their union filed an alleged unfair dismissal dispute with the CCMA. The outcome of the CCMA arbitration proceedings are not relevant for the purposes of this judgement and therefore will not be discussed.

[10] Having discovered that the notice of termination of the employment contracts was not sent to the union, the respondent faxed the notice of the summary dismissal of the employees to the union on 26 March 2012.

The issues for determination

[11] The essential issue for determination in this matter is whether the fax cover page which was faxed to the union constitutes a proper

notification of the termination of the employment contract of the employees.

[12] It was contended on behalf of the respondents that an employer has the right in law to terminate the employment contract without notice. It was further submitted that there was no statutory or contractual duty for the respondent to notify the employees of the termination of their employment contract.

[13] In support of its contention regarding the issue of notice, the respondent used the analogy of the outcome in *Steenkamp and Others v Edcon Limited*.^[2] That case in my view is distinguishable from the present matter in that, the issue of the notice in that matter arose in the context of the provisions of section 189 of the Labour Relations Act (the “LRA”).^[3] The issue did not concern the common law contract as is the case in the present matter.

- [14] The other argument raised by the respondents was that the union should have consulted with them upon receipt of the fax covering page to find out about the remainder of the pages which was supposed to be attached to the covering page. The underlying suggestion in this regard is that, had the union contacted them about the fax covering page, the issue would have been clarified to them.

Evaluation/analysis

- [15] The union's case in this matter is that the termination of the employment contract of its members was on 26 March 2012, when the actual notice of termination was received and not when the cover page of the fax was sent by the respondent to it.
- [16] The respondent on the other hand contended that the date of dismissal was 30 January 2012 when they transmitted the fax covering page to the union. It is common cause that, that page did not have the actual outcome of the disciplinary hearing but was intended to have attached to it the outcome of the disciplinary hearing.
- [17] The question of the effective date of termination of contract by notice received attention in the case of *Sebola v Standard Bank and Another*.^[4] In dealing with termination of contract by notice under the common law the Constitutional Court held that:

"[107] I begin by showing how problems similar to the one confronting the Court in the present case have been dealt with at common law. I trace the line of Appellate Division cases relating to notices of cancellation where the Appellate Division required actual knowledge.

If, in that era, the Appellate Division advocated actual awareness, then I can see no reason why this Court, alive to the realities of South Africa, should not require actual knowledge in this time and age. I also refer under this part of the judgment to the law relating to the termination of a contract of employment, which similarly supports the proposition that, when a notice of termination of such contract is required to be given, the content of the notice must be conveyed to the other party for the termination to be effective or valid."

The Court further held that:

"[108] At common law a party to a contract has the right to cancel or terminate a contract such as that of a lease or of employment by giving the other party a notice even if there was no breach of contract by the other party unless the contract provides otherwise. In a case where such a party has to give the other party a notice of termination of the contract, the notice is required to be conveyed to the other party. I do not understand our case law to reveal any concern of insurmountable problems about proof of the conveyance of the notice to the other party. Furthermore, in those cases where a party such as a seller or lessor has contractually bound himself to give notice to the other party that the latter is in breach of his agreement and calls upon him to remedy the breach before he can exercise his right to cancel the agreement or to institute legal proceedings, the notice is required to reach the mind of the other party.

- [18] In relation, specifically, to the termination of the employment contracts the Constitutional Court in that case had the following to say:

“[119] The common law rule that a notice of termination of a contract by one party must reach the mind of the other party to the contract in order to be effective also applies to contracts of employment. In Transport & Allied Workers Union & Others v Natal Co-operative Timber Ltd (NCT) the Court held that the notice of termination of a contract of employment “must be given to the employee personally unless he has appointed an agent with authority to receive such notice on his behalf.. .

[120] At common law a notice of the termination of a contract, including a contract of employment, must also be clear, unconditional and unequivocal.¹⁰⁹ In the NCT case the Court dealt with the rationale behind the requirements that the notice of termination of a contract must be clear, unequivocal and unconditional. McCall J said:

“It seems to me that the rationale behind the requirements that the notice must be clear and unequivocal and that it must be unconditional is, as far as the employee is concerned, the same. He must be left in no doubt as to where he stands as far as his continued employment is concerned as to what the employer’s intentions are with regard thereto. In the case of a dismissal, on notice, for misconduct or incompetence

for example, he must know that his employer has elected to terminate his contract from a specific date, so that he may govern his conduct accordingly. He may decide to accept the termination . . . [or] claim specific performance”.

[19] The principle to discern from the above, as correctly pointed by the union in argument, is that the party that terminates an employment contract by means of a notice has the duty to ensure that such notice comes to the attention of the other party. Furthermore, the notice will take effect once it has been brought to the attention of the other party.

[20] The respondent contended in its submission that the union should have contacted it upon receipt of the fax covering page to enquire about it or inform the respondent that the transmission was incomplete. In my respectful view, there is no merit in this submission. In fact, the contrary is that, the duty was on the respondent to have contacted the union to confirm if they had received the faxed

document.

[21] In as far as the submission made by the respondent is concerned, it does appear to me that the respondent confuses the duty to consult as envisaged in section 189 of the LRA with the circumstances in the present matter. In the present matter the termination of employment

contract was not for reasons related to operational requirements but was, on the version of the respondent, a dismissal for misconduct.

[22] On the facts as stated above it cannot, even if the version of the respondent was to be accepted, be said that the union and its members acquired knowledge of the termination of the employment contract on receipt of the fax covering page.

[23] It needs to be emphasised that the termination of the contract of employment in the present matter occurred in the context where the employees were initially suspended with pay and thereafter their employment contracts were terminated without notifying them at the point that the decision was made, which is in January 2012.

[24] On the facts as stated above, it cannot even on the version of the respondent be said that the union and its members acquired the

knowledge of their dismissal when the covering page was faxed to them.

[25] In considering the facts and the circumstances of this matter, it cannot be said that the respondent had intended to terminate the employment contract without notice. This is so when consideration is had to the fact that, the respondent did send the outcome of the disciplinary enquiry subsequent to sending the covering page. In my view, common sense would say that by sending the outcome of the disciplinary hearing on that day, 6 March 2012, the respondent had surely intended to communicate to the union that the suspended contract of employment was terminated.

[26] In the circumstances I am in agreement with the contention of the union that the employment contract of the employees endured until 26 March 2012, when it was brought to the attention of the union that the employment contract was terminated. In other words, I find that, the fax cover page did not constitute notification of the termination of the contract.

The issue of quantum

[27] As indicated earlier the parties agreed that the quantum should be dealt with on the basis of the pleadings and the pre-trial minutes.

[28] In the statement of case the union on behalf of the employees claims unpaid statutory compensation from 26 January 2012 until 26 March

2012. The total amount claimed in this respect is R90 026.56. This amount is to be divided between the following employees: M Phele; T Goleleewang; B Bolele; G Koto; MR Tebele; OS Molale; OE Dikwidi; BJ Bathei; Gabannelwe; V Maroro; PM Thubisi; T J Lebese; K Kibiti; K Gae; P Phuduhudu; N Mabilo; A Rebang; B Bolele; T Gabannelwe; K Gae; P Phuduhudu; M Mabilo; and M Phele.

[29] In the opposing statement of case the respondent contended that it had paid employees all their statutory monthly payment due to each of them.

[30] In the pre-trial minutes dated 8 September 2015 the parties recorded the following:

“5. Whether the Applicants are entitled to remuneration up until 26 March 2012 been payment of 52 (fifty two) days of salary for the Applicants.”

- [31] The pre-trial minutes also recorded the precise amount of compensation for each of the employees, including how it should be calculated.
- [32] In light of the above I find that the suspended contracts of employment of the employees were terminated on 26 March 2012 and accordingly the respondents were obliged to pay their wages during the suspension period. In the circumstances the respondents are liable to pay each of the employees their outstanding wages from the date of the disciplinary hearing to the date of the notification of the outcome of the disciplinary hearing.
- [33] I see no reason why costs should not follow the results.

Order

[34] In the premises the following order is made:

1. The Respondents are ordered to pay the Applicants the total sum of R90 026.56
2. Interest on R90 026.56 calculated tempore more until date of the final payment.
3. The Respondents are to pay the costs of the Applicants the one paying the other to be absolved.

E. Molahlehi

Judge of the Labour Court, Johannesburg

Appearances:

For the Applicant: Adv R Itzkin

Instructed by: Larry Dave Attorneys

For the Respondent: Mr J Rhodie

Instructed by: Bester – Rhodie Attorneys

- [1] The employees who the respondent contended the union was not entitled to represent are; B Bolele; T Gabannelwe; K Gae; P Phuduhudu; M Mabilo; and M Phele.
- [2] (2016) 37 ILJ 564 (CC); 2016 (3) BCLR 311 (CC); [2016] 4 BLLR 335 (CC); 2016 (3) SA 251 (CC).
- [3] Act number 66 of 1995.
- [4] 2012
- (8) BCLR 785 (CC).

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