

SOUTH AFRICA / JUDGMENT

David v Crossroads Distribution (Pty) Ltd (JS 182/17) [2021] ZALCJHB 471 (14 October 2021) [2021] ZALCJHB 471

COURT

Labour Court Johannesburg

BEFORE

Mabaso

CASE / FILE NUMBER

JS 182/17

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: JS 182/17

In

the matter between:

SELVAN,
BRYAN
DAVID Applicant
and
CROSSROADS
DISTRIBUTION (PTY) LTD Respondent

Heard:

13 to 17 April 2021,
15 June 2021

Delivered:

This judgment was handed down electronically by
circulation to the parties' legal representatives
by email. The date
and time for hand down is deemed to be 10h00 on 14 October 2021.

JUDGMENT

MABASO, AJ

Introduction

- [1] The precursor to these proceedings is an August 2015 retrenchment process initiated by Crossroads Distribution (Pty) Ltd ("the Respondent"). Mr Bryan David Selvan ("the Applicant"), who was then the Respondent's National Head of Human Resource, was tasked to initiate the retrenchment process following the Respondent's financial challenges. In the sequel, the Respondent dismissed the Applicant on 30 June 2016, contending that it was based on the same retrenchment process.
- [2] The Applicant is challenging both procedural and substantive fairness of the dismissal. In contrast, the Respondent's witnesses testified that the dismissal was substantively fair; relating to the procedural aspect, the Respondent raised preliminary two-fold point thus: (i) this Court is debarred from adjudicating it under s 189A (18) read with ss (13) and (17) of the LA as it lacks jurisdiction since the learned Cele J has already made an order in this aspect; (ii) furthermore, the Applicant cannot rely on the provisions of s 191(12) of the LA because such a point was raised and finally decided by the NBCRFLI Commissioner (Commissioner Raffee) under case number GPRFBC 42061.
- [3] Based on the aforementioned issues, this Court is required to determine the following:
- (a) whether it has jurisdiction to determine procedural fairness or not? (Point 1)
 - (b) Whether it may determine the dispute in terms of section 191(12) of the LA or this issue is res judicata? (Point 2)
 - (c) Whether the dismissal of the Applicant was substantively fair or not? (Point 3)
 - (d) Whether this court must follow (the Woolworths case) which, according to the Applicant, this court must adjudicate a procedural dispute and rule that it has jurisdiction if the procedure was so grossly unfair, which would amount to substantive unfairness thereof. (Point 4)

Relevant

Background

- [4] It is common cause that: on 11 January 2016, the Respondent issued a notice in terms of s189A of the LRA ("the Notice") to among others members of SATAWU and TAWUSA (the trade unions) wherein stated that due to changing nature of the South African Post Office (SAPO) contract and regular default on payment arrangements by the SAPO and other reasons approximately 120 jobs could be affected. The CCMA facilitated the consultation process in terms of s189A (3)[1] of the LA. The Applicant represented the Respondent during

the facilitation process and is the one who had prepared the Notice.

Later, during April 2016 and 30 May 2016, the Respondent advised the Applicant that the Notice he had prepared and issued to the trade unions was also applicable to him as one of those affected by the operation requirements. This latter notice was in terms of s 189A of the LRA, and incorporated the Notice, and advised the Applicant that the support service functions would be included in the retrenchment negotiations that commenced in January 2016.

[5] Following the dismissal, the Applicant, assisted by his then trade union, Solidarity, declared an unfair dismissal dispute to the National Bargaining Council for the Road Freight and Logistics Industry ("the Bargaining Council"). The dispute was scheduled for arbitration on 08 December 2016 as it had been unsuccessfully conciliated. The Respondent raised a jurisdictional

point in that the Bargaining Council had no jurisdiction to arbitrate the dispute considering that "the Applicant was one of the 60 employees to be retrenched during [the] 12 month period", as section 191(12) of the LA provides that:

"(12) An employee who is dismissed by reason of the employer's operational requirements may elect to refer the dispute either to arbitration or to the Labour Court if-

- (a) the employer followed a consultation procedure that applied to that employee only, irrespective of whether that procedure complied with section 189;
- (b) the employer's operational requirements lead to the dismissal of that employee only; or
- (c) the employer employs less than ten employees, irrespective of the number of employees who are dismissed."[2]

[6] Consequently, on 14 December 2016, Commissioner Raffee issued a jurisdictional ruling upholding the jurisdictional point and reasoned thus: the Respondent raised a jurisdictional point that only the Labour Court has exclusive jurisdiction to deal with this matter because "the Applicant was not the only one affected by the retrenchment." In addition, Commissioner Raffee stated that the Applicant argued that the Bargaining Council "has jurisdiction to arbitrate a dispute ..where an employee who was the only employee consulted by an employer". It has to be stated that considering these statements and the ruling holistically, it is clear that the issue before Commissioner Raffee was about a dispute declared in terms of s 191 (12)(a) of the LRA. In the end, Commissioner Raffee ruled thus:

" 1. The NBCRFLI does not exercise jurisdiction over the matter.

2. The Applicant may refer the matter to the Labour Court."[3]

Following this ruling, the Applicant could either take the ruling on review or declare an unfair dispute before this Court. It has to be mentioned that it was not a transfer in terms of s 191(6) of the LRA.

- [7] Whether this interpretation by Commissioner Raffee that the Bairganning Council has no jurisdiction is correct or not is not essential for purposes of these proceedings. In addition, it remains binding until set aside by a competent court. See *Communication Workers Union and Others v Mobile Telephone Networks (Pty) Ltd and Another* (2020) 41 ILJ 2072 (LAC) and [2020] 11 BLLR 1096 (LAC).
- [8] Subsequently, the Applicant delivered a referral in this Court, explicitly averring that it was a referral in terms of section 191(5)
- (b) (ii) of the LRA claiming that his dismissal was both procedurally and substantively unfair. The Respondent, in the response, raised a jurisdictional point, now averring that it was delivered outside the required 90 day period as required by section 191(11) of the LA. This resulted in the Applicant launching a condonation application. In his founding papers therein, the Applicant contended that the referral was in terms of section 191(11)b) of the LRA.
- [9] The Respondent opposed that application and reiterated that the Labour Court has no jurisdiction to adjudicate the procedural aspect of this dismissal. In addition, it contended that the Applicant should have approached this Court in terms of the provisions of ss 189A(17) read with (13) of the LA. In the replying affidavit, the Applicant wisely conceded on this; however, now changed tack and contended that this referral was in terms of s 191(12) of the LA despite in para 6 of the founding affidavit and in the referral that it was in terms of s 191(11) of the LRA.[4]
- [10] The condonation application served before Cele J. The Respondent again raised points in limine, namely that: the Applicant by now relying on the provisions of s191(12) was misguided as he was trying to introduce new facts via a replying affidavit without leave of the Court ("in limine 1"), and that this Court has no jurisdiction to hear procedural fairness referred under section 191(5)b) (i) of the LRA ("in limine 2").[5] Consequently, Cele J decided on the in limine 1 thus:
- " The first point in limine is sustained, simple on the basis that the Applicant did not seek court's leave to introduce any new facts... So the first point is sustained."
- [11] In his judgement, Cele J, at para 49, regarding the point in limine 2 said procedural fairness would not be standalone in this matter since the retrenchment was facilitated in terms of section 189A of the LA, the avenue was s189A(13) of the RA in which the Applicant "did not utilise them in this case". Moreover, in paragraph 50, the Court made it clear that the trial court would not be in a position to proceed with the procedural aspect of the dispute as a standalone.

- [12] Before this Court, the Applicant's Counsel submitted that Cele J granted condonation for the referral of both procedural and substantive dispute, and the amended Statement of Case deals explicitly with s 191 (12)(a) of the LRA on the basis that consultation procedure applied "to the Applicant only" and argued that prohibition against a procedural challenge as envisage in s 189A(18) only applicable to a referral made under s 191(5) b)ii) of the LRA.
- [13] The Applicant contends that even if this Court happens not to agree with him regarding the procedural aspect, meaning accepting the point raised by the Respondent, procedural unfairness sometimes renders the substantiveness of dismissal unfair. In support of this, he referred to the judgments of the LAC, namely, Bracks NO & Another v Rand Water & Another LAC,[6] para 3; and Woolworths (Pty) Ltd v South Africa Commercial, Catering and Allied Workers Union and others,[7] para 22 where the LAC said:

"The distinction between procedural and substantive fairness lies close together. It is well known that procedural unfairness may result in substantive unfairness. The appropriate remedy would have been to reinstate the employees pending further consultation on the last mentioned proposal as clarified in evidence. This was not done. But the court a quo's findings may well be relevant to the substantive fairness of the dismissals of applicants 7,

13, 20,

33, 34, and 39 and the others." (Own underlining)

The law and application thereof

- [14] At this juncture, it is essential to mention that most parts of this trial concentrated on the procedural aspect of the dismissal, given that the evidence of the Applicant and the cross-examination to the Respondent's witnesses did not deal with the main issues in respect of the substantive fairness of the dismissal.
- [15] In an unfair dismissal dispute, an employer has the onus of showing that dismissal is fair. If a court's jurisdiction to hear a matter is disputed, an employee has such an onus.
- [16] At this juncture, it is prudent to highlight that the Constitutional, Court in Steenkamp and others v Edcon Ltd[8] at para 70, held as follows regarding the jurisdiction of this Court in procedural aspect of dismissal in large scale operational

requirements disputes, where a matter had been referred by way of a statement of claim:

"The jurisdiction of the Labour Court to adjudicate on the procedural fairness of a dismissal based on the employer's operational

requirements has been ousted by section 189A (18) of the LRA.

Considering the judgement of Cele J and listening to the Applicant's Counsel submissions, the issue of procedural aspect relating to section 189A(13) read with s (17) is no longer an issue in this matter, as Cele J clarified this. Therefore, from now onwards, the concentration will be on section 191(12), which is whether this Court may adjudicate the procedural aspect under that section.

Woolworths case (Point 4)

- [17] Reliance by the Applicant to the matter of Woolworths is misplaced here, based on the following reasons: The facts of this matter and that of Woolworths are not the same. In Woolworths, the applicant union had approached this Court challenging the procedural fairness of dismissal in terms of the provisions of section 189A(13) read with (17), and later declared separate substantive fairness of the dismissal before the same Court. Later both applications were consolidated.
- [18] Whereas in casu, the Applicant delivered a statement of case challenging both procedural and substantive fairness of the dismissal, along the way, the Applicant disavowed his reliance on the provisions of section 189A(13) read with ss (17); hence he proceeded to attempt to amend his papers in order to rely on the provisions of s 191(12)(a) of the LRA.
- [19] Considering both authorities, the LAC said the statement above in passing, so it has no binding effect. It has to be taken into account that the LAC was dealing with an appeal which the Court a quo had been called upon to adjudicate both procedural and substantive fairness of the dismissal following the consolidation of the matters. My understanding of the LAC judgment did not conclude that from now onwards, the procedural aspect of the dismissal relating to operational requirements would amount to substantive fairness, whereby it is found that it was grossly unfair. Even the statement in Bracks NO & Another v Rand Water & Another relating to this issue is obiter dictum (said incidentally).

Section 191(12) / Res judica.

- [20] Following the dismissal, the Applicant declared a dispute to the Bargaining Council as allowed by the provisions of s 191(1a)(i) of the LA. That dispute was between the Applicant and the Respondent, emanating from the same dismissal dispute before this Court. That dispute was unsuccessfully conciliated. The Applicant had an option in terms of s 191(12) of the LA to either refer the dispute for arbitration or to this Court for adjudication if the dispute was covered by the provisions of s 191(12)(a) or (b) or (c) of the same Act. The Applicant opted for arbitration. Moreover, a point in limine was raised by the Respondent. Whether the Respondent was correct or not, it is not an issue that this Court has to determine. The only issue is whether this Court has the necessary jurisdiction to adjudicate the procedural aspect of the dismissal. This Court is of the view that it has no jurisdiction to deal with the procedural aspect of the dismissal, and the reasons thereof are provided as set out below.

[21] A dismissal dispute outcome is a judgment in personam.[9] The Constitutional Court in the matter *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation and Others*, [10] in dealing with *res judica*, stated that the requirements thereof that must be shown are that (i) there must have been a previous ruling by a competent court/forum, (li) between the same parties, (iii) based on the exact cause of action, and (iv) concerning the same subject matter or "thing". The same Court, in *Molaudzi v S*, [11] cited the work of Professor Classen thus, relating to this doctrine:

"[a] case or matter is decided. Because of the authority with which in the public interest, judicial decisions are invested, the effect must be given to a final judgment, even if it is erroneous. Regarding *res judicata*, the enquiry is not whether the judgment is right or wrong, but simply whether there is a judgment."

[22] The Labour Appeal Court also dealt with this doctrine in *Imperial Cargo (Pty) Ltd v SA Transport Allied Workers' Union (JA79/2013)* [12] at para 3 to 6. In the *Yellow Star Properties v, MEC Department of Development Planning and Local Government* [13] at para 22, the SCA, adopted by the LAC in *Gauteng Shared Services Centre v Ditsamai*, [14] held that:

"When dealing with issues [of] estoppel, it is necessary to stress not only that the parties must be the same, but the same issue of fact or law which was an essential element of the judgment on which reliance is placed must have arisen and must be regarded as having been determined in the earlier judgment." (Own emphasis)

[23] Following the conciliation, the cause of action before Commissioner Raffee was a dismissal emanating from the dismissal of the Applicant by the Respondent as the Applicant asked the Bargaining Council to arbitrate the dispute relating to operational requirements. The Commissioner issued a jurisdictional ruling wherein paragraph 6.3 thereof recorded that the issue before him as raised by the Applicant was that the forum had jurisdiction where "an employee who was the only employee that was consulted by an employer". After hearing the arguments regarding the meeting held by the Respondent with the Applicant, specifically paragraphs 9 to 11, the Commissioner held that the Bargaining Council had no jurisdiction to hear the matter. Consequently, the same subject matter was ventilated.

[24] Whether or not Commissioner Raffee's ruling was correct is not a test to determine the point raised by the Respondent under this rubric, as highlighted above. Since the ruling is final and binding on this specific subject-matter between the same parties in this matter, this Court concludes that in dealing with the exact provisions of s 191(12)(a) will be revisiting what Commissioner Raffee has already decided, in a way will be acting as a reviewing court instead of the trial court. So this Court is satisfied the Respondent managed to show that the s191(12) is *res judicata* See also *Communication Workers Union and Others v Mobile Telephone Networks (Pty) Ltd and Another* [15] is regarding the status of rulings by Commissioners.

[25] Furthermore, the Applicant was aware that Commissioner Raffee had resolved this point; hence when he approached this Court, he was specific that his dispute was being referred in terms of s 191(5) (b)(li) of the LRA. He only attempted to revert to the same cause of action that was entertained and finalised before Commissioner Raffee when the Respondent raised objections regarding the Court's lack of jurisdiction to hear the procedural aspect of the dismissal.

[26] Even if the conclusion above might be wrong, relating to s 191(12)(a), this Court opines that it would still not have

jurisdiction to deal with the procedural aspect of the dismissal, taking into account that the Applicant referred the dismissal dispute to this Court outside the 90-day period and the condonation application that was entertained and granted, reading the learned

Judge Cele's judgement, relates to the substantive fairness of the dismissal. Consequently, in order for this Court to deal with the procedural aspect, the Applicant was to bring a condonation application for the late referral of the procedural aspect, as Cele J made it clear that he was condoning the late referral in respect of the substantive fairness of the dismissal.

[27] Under the circumstances, I conclude that the procedural aspect dispute is now *res judicata*.

Substantive fairness of the dismissal

[28] In a dismissal dispute of this nature, the employer has the onus of proof that the dismissal was substantively fair and based on the reasons given. In this matter, the Applicant avered that the dismissal was a disguise as the main reason for his dismissal was because he had been accused of delaying the retrenchment process that he had been tasked with, and that was to make way for another person to be employed; therefore, there was no reason for the dismissal. This Court has to consider the totality of the evidence presented before it. The test for determining the true reason for dismissal is factual Applicant had not delayed the retrenchment process. The answer is found in the following paragraphs.

[29] The Respondent's evidence that was not disputed includes the following evidence of Mr David Behrens: in 2004, the Applicant was employed by Crossroads Distributions, which is the division of Crossroad Holdings. On or about June 2015, the Respondent, upon

realising that it was experiencing some challenges in respect of one of its clients, which is SAPO which were not settling the invoices, the revenues were dropping, and the Notice was issued, raising among others the SAPO challenges, the economic, and financial woes and its worsening because of the SAPO situation and the CFG proposed retrenchment letters, which were authored by the Applicant on behalf of the Respondent, partly reads thus,

"redundancies, a relocation of functions and a combining of functions or tasks..... However, if we decide to terminate the South African Post Office contract, then this will have an impact on many more jobs within the SAPO contracts and in the support functions.'

[30] The Respondent furthermore presented undisputed evidence regarding the support functions department; this involves the HR Department as to when the operations are reduced, the support functions reduce concomitantly. Ultimately in August 2015, employees were retrenched because of the aforementioned issues. In January 2016, the Applicant prepared another Section 189A notice wherein stated, among other things that "This notice follows on from our notice of 14 August 2015 where we were contemplating retrenchment due to the difficulties experienced with the changing nature of the South African Post Office contract..." despite this reason there were other additional reasons which involved "deteriorating in the economy". This witness testified that this letter indicated that no department was excluded from the possibility of retrenchment. As a person who consulted with the Applicant, the latter did not propose any alternative job that he could fill to avoid dismissal.

He confirmed that all contracts were subsequently renewed with reduced volumes. Therefore, it is clear that there was a need to retrench and the Applicant being part of the Department that was to be affected he knew that even his job was not safe. Moreover, the Notice was prepared by him. So the factual causation supports the Respondent's case that the dismissal was based on operational requirements.

[31] As indicated above, that the Applicant did not dispute during cross-examination the evidence of the Respondent that there was a need for retrenchment, this Court accepts the Respondent's evidence and concludes that there was a reason for the dismissal and the dismissal was substantively fair.

[32] Wherefore, the following order is made:

Order:

1. The res judica point raised by the Respondent is upheld. Consequently, this Court has no jurisdiction to deal with the procedural aspect of the Applicant's dismissal.
2. The dismissal of the Applicant by the Respondent, following operational requirements, was substantively fair.
3. Each party to bear own costs.

Sandile Mabaso

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv M Meyerowitz

Instructed by:

Bagraim Sachs Inc.

For the Respondent: Dr B Van Zyl

Instructed by:

Van-Zyl Rudd Inc Attorneys

- [1] The Commission must appoint a facilitator in terms of any regulations made under subsection (6) to assist the parties engaged in consultations if- (a) the employer has in its notice in terms of section 189 (3) requested facilitation; or (b) consulting parties representing the majority of employees whom the employer contemplates dismissing have requested facilitation and have noticed the Commission within 15 days or the notice
- [1] The Commission must appoint a facilitator in terms of any regulations made under subsection (6) to assist the parties engaged in consultations if-
 - (a) the employer has in its notice in terms of section 189 (3) requested facilitation; or
 - (b) consulting parties representing the majority of employees whom the employer contemplates dismissing have requested facilitation and have noticed the Commission within 15 days or the notice
- [2] (Own emphasis)
- [3] No suggestion that the parties had asked the matter to be "transferred" to this Court in terms of section 191(6) of the LRA.
- [4] This position is confirmed by the Judgment of this Court, per Cele J, in the condonation application.
- [5] The Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employers' operational requirements in any dispute referred to it in terms or section 191
- (5) (b) (ii) "File 4 of 4 Respondents Schedule of documents):
p 83-line 9 to 16
- [6] [2010] 8 BLLR 795 (LAC)
- [7] [2017] 12 BLLR 1217 (LAC)
- [8] [2019] 11 BLLR 1189 (CC)
- [9] Referring to an act in connection with a specific person.
- [10] [2020]

(1) SA 327 (CC)

[11] [2015]

(8) BCLR 904 (CC)

[12] [2015] ZALAC 81

[13] [2009]

(3) AII SA 475 (SCA)

[14] [2012] 4 BLLR 328 (LAC)

[15] [2020] 11 BLLR 1096 (LAC)

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