

SOUTH AFRICA / JUDGMENT

De Klerk v NUFAWSA (JS1029/20) [2023] ZALCJHB 140 (12 May 2023)

[2023] ZALCJHB 140

COURT

Labour Court Johannesburg

BEFORE

M Makhura

CASE / FILE NUMBER

JS1029/20

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: JS1029/20

In the matter between:

HERCULES

ALBERTUS DE KLERK Applicant

And

THE

NATIONAL UNION OF FURNITURE AND

ALLIED

WORKERS OF SOUTH AFRICA (NUFAWSA) Respondent

Heard:

11 - 12 May 2023

Delivered:

12 May 2023

JUDGMENT

MAKHURA, AJ

Introduction

- [1] This matter was set down for trial on 11 and 12 May 2023. The applicant launched these proceedings, claiming that he was dismissed and that his dismissal was automatically unfair within the meaning of section 187(1)(f) of the Labour Relations Act[1] (LRA), alternatively that his dismissal was substantively and procedurally unfair. In addition, he sought an order for payment of accrued leave in the amount of R24 964.65, and payment of the honorariums due to him for his attendance of the executive meetings in the amount of R18 000.00.
- [2] The respondent opposed the claim primarily on the basis that the applicant was not an employee but an independent contractor, and in any event, even if this Court finds that he is an employee, his evidence on all three claims failed to establish a *prima facie* case.
- [3] The applicant bore the onus of proof. As a result, he was the first to give evidence. At the end of his re-examination, the applicant closed his case. The respondent then applied for absolution from the instance. The simple question is really whether the applicant satisfied the threshold, being whether his evidence established a

prima facie case.

Test for absolution

- [4] In *Gordon Lloyd Page & Associates v Rivera and another*,[2] the Supreme Court of Appeal held that:

‘The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G - H in these terms:

“(W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court,

applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (Gascoyne v Paul and Hunter 1917 TPD 170 at 173; Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958 (4) SA 307 (T).)”

This implies that a plaintiff has to make out a *prima facie* case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff... Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice...’

- [5] In the context of dismissal disputes, more specifically an automatically unfair dismissal dispute, the Labour Appeal Court (LAC) in *Commercial Stevedoring Agricultural and Allied Workers Union on behalf of Dube and others v Robertson Abattoir*[3], referred to by Lagrange J in *Bakulu v Isilumko Staffing (Pty) Ltd and others*,[4] confirmed the applicable test as follows:

‘...[T]he test which must be determined is whether firstly there was a dismissal and secondly whether the appellant has provided evidence

which raises a credible possibility that the dismissal in question fell within the scope of s 187(1)(c) of the LRA. This approach has been confirmed by this court in *Kroukam v SA Airlink (Pty) Ltd*:

“In my view, s 187 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 s 187 for constituting an

automatically unfair dismissal.” [Footnotes omitted]

[6] The evidence does not raise a material dispute of facts. The respondent issued a letter of appointment dated 1 August 2006. The applicant accepted the appointment as a Legal Officer, with effect from 1 August

2006. In terms of his appointment, he was responsible for representing the union in arbitrations at the Commission for Conciliation, Mediation and Arbitration (CCMA) and bargaining councils, and assisting the union in setting and achieving its objectives, which are contained in the respondent’s constitution. He reported to the Secretary General. He would work from home and be remunerated monthly, subject only to tax deductions. The appointment letter also contained the following clause:

‘TERMINATION OF AGREEMENT: Either party may terminate this appointment by giving 3 calendar months notice.’

[7] The applicant was not given the tools of trade such as a telephone, cellular phone or computer. He used his personal email address. He also assisted as a caretaker at a farm or guest house where he lived.

In return for this service, he was not required to pay for accommodation. He was only responsible for water and electricity.

[8] For the duration of his service, the applicant was not given a payslip. He was provided with one on the termination of his employment. His evidence was that he had requested this payslip for tax purposes.

Analysis

Primary defence: whether the applicant is an employee or an independent contractor?

[9] In *State Information Technology Agency (Pty) Ltd v Commission For Conciliation, Mediation and Arbitration and others*[5] (SITA), the LAC held that when a court determines the question of an employment relationship, it must work with three primary criteria,

(1) an employer's right to supervision and control; (2) whether the employee forms an integral part of the organisation with the employer; and (3) the extent to which the employee was economically dependent upon the employer.

[10] Mr Mndebele, counsel for the applicant, submitted that to prove that the applicant was an employee, a letter from the respondent dated 30 January 2017 records that the applicant had authority and permission to represent it. In addition, he relied on a provision of the constitution, which provides that representatives of the respondent shall either be its employees or its members who are engaged and employed in the industry. Mr Mndebele submitted further that the applicant was under the supervision of the Secretary General, appeared on behalf of the respondent at the CCMA and bargaining council, appears on the respondent's website and was economically dependent on the salary from the respondent.

[11] Mr Lennox for the respondent submitted that the applicant had no leave accruing to him, as evidenced by the payslip submitted as part of his record. He took leave as and when he wanted without application to, consultation

with, or permission from the respondent. Further, the applicant did not contribute to the pension fund and medical aid. He did not contribute to the Unemployment Insurance Fund[6] (UIF). The applicant was not economically dependent on the remuneration he received from the respondent. In addition to his pension, he was able to perform other work in return for payment in kind. In addition, the applicant was not given the tools of trade.

[12] Relying on the SITA judgment, Mr Mndebele submitted that the provision of the tools of trade is not a factor in determining whether the applicant is an employee. He said that the SITA judgment refers to three categories, as detailed above. I do not understand this judgment to exclude other factors such as the tools of trade. Factors such as contribution to medical aid, pension fund and UIF, entitlement to sick leave and performing other work without consultation or permission were considered as part of an enquiry into the determination of the nature of the employment relationship.[7] The manner in which the applicant worked, the economic dependence and the provision of tools of trade are all relevant factors.[8]

[13] Considering all the factors, the relationship between the applicant and the respondent was, in reality, one of an independent contractor. The appointment letter makes no reference to the applicant being appointed as an employee subject to the policies of the respondent. Significantly, the termination clause only provides for termination on three months' notice. No reference is made to termination based on retrenchment, misconduct or incapacity or subject to the policies of the respondent.

- [14] There was no evidence to suggest that the applicant was provided with the policies of the respondent with which he had to comply. No doubt such policies would have included a policy regulating leave pay. The applicant could not articulate the basis for his claim for leave pay other than saying that it was a practice. He did not adduce evidence to demonstrate how his leave days accrued over the year.
- [15] No contract of employment was signed between the parties. The applicant did not contribute to the pension fund and was not required to be a member of a medical aid. He was not provided with a payslip. He was not required to apply for leave whenever he went on leave because, according to him, it was not necessary. The fact that he reported to the Secretary General and took instructions from him is of no material consequence. Independent contractors, depending on the work for which they are appointed, are subject to supervision. This is one such case.
- [16] During the meetings where the parties discussed the termination of the applicant, there was no reference to the termination of a contract of employment. The respondent referred to the termination of the contract and the termination of “services he rendered”.
- [17] The letter referring to the applicant as an employee or official and the fact that the constitution states that the respondent shall be represented by either an official or member does not alter the nature of the relationship. Accordingly, the applicant was not an employee of the respondent. The application for absolution from the instance must succeed. The respondent is therefore granted absolution in respect of claims 1 to 3.

Alternative defence: automatically unfair dismissal claim

- [18] Even if I am wrong in granting absolution based on the above, and the applicant is in fact an employee of the respondent, his evidence fell far short of establishing a prima facie case that he was dismissed as envisaged in section 187(1)(f) of the LRA, or that his dismissal was substantively and procedurally unfair.

- [19] Section 187(1)(f) of the provides as follows:

‘(1) 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 –

...

- (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to... age...’

- [20] Section 187(2) provides that:

‘Despite subsection (1) (f) –

- (b) a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity.’

- [21] At the time of his appointment, the applicant had already passed the normal retirement age. He has conceded this. In fact, his concession was that he had passed the normal retirement age in the industry.
- [22] In any event, on 13 September 2014, the applicant took part in the meeting of a National Executive Committee (NEC) where the NEC unanimously agreed that the normal retirement age would be a minimum of 60 years and a maximum of 65 years. Asked why he did not object to this resolution, the applicant said that he did not object because he had a contract of employment. Furthermore, because he was employed after retirement, he was told that this would not affect him. In essence, his evidence was that he was exempted from this policy decision or resolution. Sadly, this case was not contained in the applicant's statement of claim nor was it recorded in the pre-trial minute.
- [23] On 4 July 2020, the applicant was informed that the respondent had taken a decision to terminate the contract at the end of December
2020. He was also informed that it would be "suitable for him to now be officially on retirement".
- [24] Regarding the second claim of accrued leave, the applicant did not give evidence to support the claim other than saying that in December/January every year, he would get 2 to 3 weeks off. He was not able to state when the respondent's offices closed and for how long. He was therefore unable to demonstrate how the amount was computed.
- [25] Regarding claim 3, the applicant has conceded, during cross-examination, that he has no claim against the respondent for R18 000.00. Importantly, he conceded that he has been paid for his attendance of these meetings.
- [26] The applicant's claim before this Court is stillborn. He has failed to adduce evidence which raises a credible possibility of this Court finding that (1) he is an employee, (2) he was dismissed, (3) his dismissal was automatically unfair alternatively, substantively and procedurally unfair and (4) he is entitled to payment as set out in claims 2 and 3. I am therefore of the view that it is legally appropriate and in the interests of justice that an application for absolution from the instance is granted.

Costs

- [27] Mr Lennox for the respondent argued that the respondent survives on the subscriptions of its members and should not be settled with costs defending a meritless and frivolous case. He argued that the applicant refused an opportunity
- to comment and/or provide reasons why he should not pay the costs of these proceedings. Mr Mndebele argued that, considering the
- requirements of law and fairness,[9] and the conduct of the applicant in these proceedings,[10] the applicant should not be ordered to pay the costs.

[28] It is trite that in labour disputes, costs do not follow the result.[11] This matter came before this Court as a labour dispute. Accordingly, a party seeking costs must place facts before this Court to justify a deviation from the principle that costs do not follow the result. I am mindful of the fact that the respondent forwarded a copy of the LAC judgment in *Motor Industry Staff Association and another v Great South Autobody CC t/a Great South Panelbeaters*[12] to the applicant and invited him to withdraw the current case, however, I do not believe that this is sufficient to warrant a deviation from the principle. The applicant's case is distinguishable on the facts. This Court should not make orders that

would unduly discourage parties from approaching this Court in their endeavour to assert their rights.

[29] In the premises, I make the following order:

Order

1. The respondent's application for absolution from the instance is granted.
2. There is no order as to costs.

M. Makhura

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. V Mndebele

Instructed by: Wilken Incorporated

For the Respondent: Adv. M Lennox

Instructed by: Beech Veltman Incorporated

[1] Act 66 of 1995, as amended.

[2] 2001

(1) SA 88 (SCA) at para 2.

[3] (2017) 38 ILJ 121 (LAC) at para 16.

[4]

(2018) 39 ILJ 597 (LC) at para 3.

[5]

(2008) 29 ILJ 2234 (LAC) at para 12.

[6] In terms of the Unemployment Insurance Act 63 of 2001 and Unemployment Insurance Contribution 4 of 2002, employees and employers are required to contribute to the UIF.

[7] SA Broadcasting Corporation v McKenzie

(1999) 20 ILJ 585 (LAC) at para 32.

[8] Denel (Pty) Ltd v Gerber

(2005) 26 ILJ 1256 (LAC) at para 200.

[9] Section 162(1) of the LRA.

[10] Section 162(2)(b) of the LRA.

[11] Zungu v Premier of the Province of KwaZulu-Natal and others (2018) 39 ILJ 523 (CC) at para 24; Booï v Amathole District Municipality and others

(2022) 43 ILJ 91 (CC) at para 60.

[12]

(2022) 43 ILJ 2326 (LAC).

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCJHB/2023/140.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/de-klerk-v-nufawsa-unknown-topic-alcjhb-2023>

Prepared on 10 October 2026 · Esheria