

SOUTH AFRICA / JUDGMENT

Modipa v Road Accident Fund (J942/23)

[2023] ZALCJHB 225 (10 July 2023)

[2023] ZALCJHB 225**COURT**

Labour Court Johannesburg

BEFORE

Lallie

CASE / FILE NUMBER

J942/23

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Source record**IN****THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG****Not****Reportable****CASE****NO: J942/23****In****the matter between:**

PAUL
MOLEFI AMOS MODIPA
Applicant
and
ROAD
ACCIDENT FUND
Respondent

Heard:

6 July 2023

Delivered:

This judgment as handed down electronically by circulation to the Applicant's and Respondent's Legal Representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing - down is deemed to be 16h00 on 10 July 2023.

JUDGMENT

LALLIE, J

- [1] The applicant filed this urgent application in terms of section 189A(13) of the Labour Relations Act[1] (the LRA). He seeks an order directing the respondent to reinstate him until it has complied with a fair procedure in dismissing him for its operational requirements. The application is opposed by the respondent which relied, inter alia, on the applicant's alleged failure to prove the urgency of this application.
- [2] The applicant was employed by the respondent as a General Manager: Forensic Investigations Department on 1 October 2014 on a five year fixed term contract. On 23 August 2018 the fixed term contract was extended by a further five years to 30 November 2024. In June 2022 the respondent informed the applicant of its restructuring exercise which would result in, inter alia, the redundancy of his position. He was invited to a meeting which was held on 11 August 2022 where the new structure and function of the Forensic Investigations Department was discussed. The applicant was further furnished with a document which outlined the process the respondent would follow before dismissing him for its operational requirements in this judgment. The dismissal will also be referred to as a retrenchment. In the same meeting the respondent offered the applicant a voluntary severance package of R1 436 727.00. On 19 August 2022 the applicant made a counter proposal of R2 536 322.00 which was rejected by the respondent.
- [3] On 16 September 2022 the respondent issued all its employees with a notice in terms of section 189 (3) of the LRA as it contemplated to embark on a large scale retrenchment as envisaged in section 189A (1) of the LRA. On 27 September 2022 the respondent issued the applicant with the same notice. On 8 June 2023, the respondent issued the applicant with a notice of the termination of his services with effect from 30 June 2023. On 28 June 2023, the applicant filed the urgent application at hand.

Urgency

- [4] The respondent sought an order dismissing or striking this

application from the roll with costs for lack of urgency. It relied on rule 8(2) (a) of the Labour Court Rules which requires an

applicant seeking urgent relief to give reasons for urgency and state why urgent relief is necessary. It was the respondent's contention

that the applicant gave no reasons for urgency. It was further the respondent's case that the applicant had failed to demonstrate that he would not be able to obtain relief in due course. In defence of the urgency of his application, the applicant submitted that because the application is brought in terms of section 189A (13) of the LRA, its urgency was not regulated by rule 8 but by section 189A. Section 189A (17) of the LRA provides that 'an application in terms of subsection (13)

must be brought not later than 30 days after the employer has given notice to terminate the employee's services ...'. The date on which the respondent gave the applicant notice of the termination of his services is in dispute. The applicant submitted that he was given the notice on 8 June 2023. The respondent expressed the view that the notice was given in the letter it addressed to the applicant on 25 April 2023.

- [5] The applicant brought this application in terms of section 189A (13) of the LRA. The correct test to determine the urgency of this application is not the general one in rule 8. It, instead, is the one provided for in section 189A (17) (a) of the LRA. When legislation is clear and unambiguous, it is given a literal interpretation. Section 189A (17) (a) gives applicants in subsection (13) applications 30 days to challenge the procedural fairness of their retrenchment. The applicant had to prove that he brought this application within 30 days of being given notice of the termination of his services for the respondent's operational requirements in order to succeed in establishing urgency.
- [6] The applicant submitted that he brought this application within the 30 day period prescribed in section 189A (17) (a) of the LRA. He relies on the following letter he received from the respondent on 8 June 2023:

'TERMINATION NOTICE: PAUL MODIPA// ROAD ACCIDENT FUND ("RAF")

1. Reference is made to the above matter.
2. We also refer to the letter which was sent to you on 25 April 2023.
3. Subsequent to the latter dated 25 April 2023, there was a further discussion held with you which culminated in an extension of your termination date by another month until 31 May 2023.
4. Due to a business requirement for you to conclude the handover process, it is essential for the RAF to further extend your termination date to 30 June 2023.
5. It is therefore hereby communicated to you that your employment contract will be terminated for operational requirements with effect from 30 June 2023.
6. RAF has therefore considered the terms of a severance package, which is as follows:
 - 6.1 Two (2) weeks salary for every completed year of service.
 - 6.2 Two (2) months' salary in lieu of notice.
 - 6.3 Payment of Annual Performance target bonus of which the applicable provisions in terms of the respective policy will apply.
7. During your period of service, you reported to the Office of the Chief Corporate Governance and as such you are obligated to handover all your work responsibilities to the office by close of business 30 June 2023.

8. The RAF would like to thank you for your diligent service and wishes you well in your future endeavors.'

[7] In support of its version that the application was launched after the 30 day period had expired, the respondent relied on the following letter of 25 April

2023:

'CONFIRMATION OF SECTION 189 OF THE LRA RETRENCHMENT PACKAGE

1. The Section 189 of the LRA consultation meeting of 25 April 2023 has reference.
2. The RAF presented the retrenchment package which you will be entitled to upon termination of your contract of employment for operational requirements on 30 April 2023.
3. Your submission for nine (9) months' to conclude the section 189 of the LRA process was not approved.
4. The RAF offers you the following benefits in the conclusion of the Section 189 of the LRA process:
 - Two (2) weeks salary for every completed year of service;
 - Two (2) months' notice pay in lieu of the notice period;
 - Payment of Annual Performance Bonus (APB) subject to the relevant provisions in the Performance Management Policy.
5. The statutory payments due to you will be addressed in the final correspondence that will be sent to you in due course.'

[8] It was the applicant's case that the purported notice given in the letter of 25 April 2023 is unlawful. It can therefore not constitute notice as contemplated in section 189A (17) (a) of the LRA. The heading of the letter of 25 April 2023 is 'CONFIRMATION OF SECTION 189 OF THE LRA RETRENCHMENT PACKAGE'. Notwithstanding the purpose of the letter, it cannot be denied that in paragraph 2 the respondent informs the applicant that his contract of employment would be terminated for operational requirements on 30 April 2023. The respondent correctly pointed out that in his founding affidavit the applicant submitted that after receiving the letter of 25 April 2023, he 'was surprised to note that his employment was terminated with less than 5 days' notice'. The applicant understood that the letter of 25 April encompassed the notice of the termination of his services for the respondent's operational requirements.

[9] It was the applicant's contention that the respondent could not rely on an unlawful notice. Section 189A (8) of the LRA provides that when the facilitator has not been appointed to assist the parties engaged in a large scale retrenchment during the consultation process, the employer may give notice to terminate contracts of employment in accordance with section 37 (1) of the Basic Conditions of Employment Act[2] (the BCEA). Section 37 (1) of the BCEA

provides that the notice period due to an employee who has been employed for a year or longer is four weeks. It is common cause that the applicant had worked for the respondent for over a year on 25 April

2023. However, section 38 of the BCEA provides that an employer may pay an employee in lieu of notice. In lieu of notice. In paragraph 4 of the letter of 25 April 2023, the respondent offers two months' notice pay in lieu of the notice period. The applicant's argument that the termination notice was unlawful is incorrect.

[10] In all the correspondence the respondent addressed the applicant subsequent to the letter of 25 April 2023 it did not withdraw the notice of the termination of his employment for its operational requirements. The extension of the termination date and the salary increase the applicant received had no impact on the notice of termination of his services. The termination notice dated 8 June 2023 which made reference to the letter of 25 April 2023 and other events which happened thereafter did not negate the notice that had already been given. This application was launched on 28 June 2023 more than 30 days after the applicant had received the termination notice of 25 April 2023. Section 189A (17) (b) enables the Labour Court to condone non-compliance with subsection (17) (a) on good cause shown. The applicant did not shown good cause to have the delay condoned. I have taken into account the authorities the applicant sought to rely on including *Voice of the Workers of South Africa Civil Rights Union v Kijima Construction (Pty) Ltd*[3] and *South African Airways (SOC) Limited (In Business Rescue) and Others v National Union of Metalworkers of South Africa obo Members and Others*[4]. They all support a literal interpretation of section 189A (17) (a) and (b) of the LRA. In the circumstances, the applicant has failed to prove the urgency of his application.

[11] The respondent sought a costs order against the applicant. In light of the events that followed the letter of 25 April 2023, the applicant did not act unreasonably in filing this application. A costs order will, in the circumstances, not be appropriate.

[12] In the premises, the following order is made:

1. The application is struck from the role for lack of urgency.
2. There is no order as to costs.

Z. Lallie

Judge of the Labour Court of South Africa

Appearances: For the Applicant: Advocate V.M Mndebele Instructed by Justice Mdhuli Inc
For the Respondent: Advocate T.K Manyage Instructed by Mpoyana Ledwaba Inc

[1] 66 of 1995 as amended.

[2] 75 of 1997 as amended.

[3] (JS91/2022) [2022] ZA LCJHB 153 (1 June 2022).

[4]

(2020) 41 IU 2113 (LAC).

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