

SOUTH AFRICA / JUDGMENT

Morapedi and Others v Enforce Security Services (JS370/15) [2018] ZALCJHB 180 (11 May 2018)

[2018] ZALCJHB 180

COURT

Labour Court Johannesburg

BEFORE

GN Moshwana

CASE / FILE NUMBER

JS370/15

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

no: JS370/15

In

the matter between:

TALE

JULIUS MORAPEDI & OTHERS

Applicant

and

ENFORCE

SECURITY

SERVICES

Respondent

Heard:

07 May 2018

Delivered:

11 May 2018

Summary: A referral in terms of which the applicants allege that they were dismissed for operational reasons – this court retains jurisdiction to hear such disputes. Dismissal substantively fair but procedurally unfair- compensation to be just and equitable. The applicant obtained alternative employment a day after their dismissal. Held: (1) The dismissal is substantively fair but procedurally unfair. Held: (2) The respondent is ordered to pay to the applicants' compensation. Held: (3) No order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is a referral in terms of section 191 of the Labour Relations Act^[1] ('the Act'). The applicants (Julius Morapedi ('Morapedi'), Moningi Freddie, Thomas Rikhotso and Sam Maila) alleged that the respondent unfairly dismissed them for operational reasons. At the outset the respondent contended that this court lacked jurisdiction. I issued an ex tempore ruling that this court had jurisdiction. The respondent contended that due to termination of a contract with its client, it had no other alternative jobs for the applicants, accordingly, the dismissal was fair.

Background

facts

- [2] The bulk of the facts in this matter are common cause. On 16 August 2014, the applicants entered into a one year fixed term contracts of employment with the respondent. The applicants were employed as security guards and were posted at various sites owned and controlled by Eris Property Group – the respondent's client.
- [3] On 1 September 2014, the respondent's client issued a notice of cancellation of services at various sites, where the applicants were assigned. In terms of the notice, by 31 October 2014, the services would terminate. In terms of clause 23.3^[2] of the fixed term contracts, the applicants accepted that their employment with the respondent was dependent upon the retention by the respondent of the client at whose premises the applicant would be assigned.
- [4] On 28 October 2014, the respondent issued notices of termination to the individual applicants. The relevant portion of the notices read thus:

“As per the Consultation Process, the client has terminated the Contract being (Name of the site) managed by the Eris Property Group, on such basis, the Company does not have available sites to accommodate you within the Leanership Contract and as such, have no other alternative[3] but to honour and effect the abovementioned contractual agreement”

- [5] Indeed, on 31 October 2014, the applicants were no longer employed by the respondent. On 1 November 2014, they took up employment with another security company. The applicants referred an unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration (‘CCMA’). On 22 April 2015, Commissioner P Botha issued a ruling to the effect that the CCMA lacked jurisdiction to entertain the dispute since the parties agreed that the dismissal was based on operational requirements and it involved 20 employees.
- [6] On 20 May 2015, the applicants referred the dispute to this court by way of a statement of case. The statement of case simply stated that the applicant is Tale Julius Morapedi and 19 others. However, there was no list of the alleged 19 others. Instead a number of confirmatory affidavits were annexed to the statement of case.
- [7] On the day of trial only four applicants appeared and presented their case. The other individuals who submitted confirmatory affidavits were not in attendance. Accordingly, I ruled that their respective cases cannot be proceeded with due to non-appearance.

Common cause issues

- [8] It was common cause that on 31 October 2014, the respondent terminated the contracts of the applicants. It was also common cause

that on 1 November 2014, the applicants were employed by the respondent’s successor, being the security provider who secured

a contract with Eris Property Group and who replaced the respondent at the sites at which the applicants had been posted.

Evidence Led

- [9] Since dismissal was not placed in issue, the respondent bore the onus and the duty to begin. The respondent chose to call one witness – Wayne Hammond (‘Hammond’). He testified that he is employed as a General Manager in an entity known as Accelerated Services. This entity apparently bought the business of the

respondent. At the time of the dismissal he was employed by the respondent and in fact he is the one who effected the dismissal of the applicants. He testified that at the time of dismissal the applicants were on probation. He confirmed the termination of

services by the client of the respondent. As to the reasons for the dismissal of the applicants, he testified that due to the termination

of contract with their client, the respondent had no alternative work for the applicants. Since the applicants were on probation he thought their contracts can be terminated by giving one-day notice.

[10] For the applicants only Morapedi testified. He confirmed that on 28 October 2014, he received a notice of termination. As of 1 November 2014 he was employed by another company at the same site he was posted at during his employ with the respondent and continued to receive a salary.

Evaluation

[11] In this matter, the respondent chose not to rely on the automatic termination clause. Instead the respondent opted to terminate using operational reasons. It is operational reasons where an employer has no available sites to accommodate employees. Differently put such an employer has excess staff. In terms of section 192 of the Act, the onus is on the respondent to prove that the dismissal was fair. In terms of section 188, a dismissal is fair if it is for a fair reason and effected in accordance with a fair procedure.

[12] Dismissing an employee for operational reasons is fair. I am satisfied that on the uncontested evidence, the respondent no longer had work following the termination of the service contract. It is uncontested that dismissing the applicants was the only viable option available to the respondent. Accordingly, the dismissal of the applicants was substantively fair.

[13] I am not satisfied that the dismissal was procedurally fair. There was no attempt to comply with the provisions of section 189 of the Act. Other than testifying that he effected the dismissal, Hammond did not testify of any process that he followed to effect such a dismissal. The fact that the applicants were on probation, is of no moment. They were not dismissed for incapacity but for operational requirements. As such, it is mandatory for the respondent to have complied with the provisions of section 189 of the Act. Failure to do so renders the dismissal procedurally unfair. I therefore conclude that the dismissal of the applicants is procedurally unfair.

The issue of the relief

[14] Since the dismissal is found to be procedurally unfair only, the only relief to afford the applicants is that of compensation[4]. In terms of section 194 (1) of the Act, compensation to be awarded must be just and equitable. In *Arb Electrical Wholesalers (Pty) Ltd v Hibbert*[5], the Labour Appeal Court ('LAC'), per Waglay JP, had the following to say about compensation:

[22] The compensation that an employee, who has been unfairly dismissed or subjected to unfair labour practice, may be awarded is not aimed at making good the patrimonial loss that s/he has suffered. The concept of loss or patrimonial loss may play a role to evince the impact of the wrong upon the employee and thus assists towards the determination of appropriate compensation, but compensation under the LRA is a statutory compensation and must not

be confused with a claim for damages under the common law, or a claim in delict. Hence, there is no need for an employee to prove any loss when seeking compensatory relief under the LRA.

[15] The court went further to state that compensation under the Act is a solatium, which equates to payment for the impairment of the employee's dignity. The individual applicants were humiliated in that they were not afforded their rights under section 189 of the Act. The wrong is not seriously impactful in that the applicants did

not suffer any financial loss. However, such does not mean that solatium must not be paid. The LAC in *Arb supra*, further said:

[24] ...The solatium must be seen as a monetary offering or pacifier to satisfy the hurt feeling of the employee while at the same time penalising the

employer.

[16] Accordingly, the applicants before me are entitled to a monetary offering. In my view what is just and equitable in the circumstances is payment of an equivalent of two months' salary to each of the applicants. Before I conclude, it is befitting for me to deal with the "claims of the other applicants". Morapedi indicated that he was appearing on behalf of the other applicants who were not in court. Representation in the Labour Court is regulated by section 161 of the Act. Morapedi is not one of the mentioned representatives. Accordingly, the other applicants, if indeed they were parties, ought to have appeared in person. If a party fails to appear in person his or her case cannot be proceeded with.

Order

[17] In the results, I make the following order:

1. The dismissal of only the applicants mentioned in this judgment is substantively fair but procedurally unfair;
2. The respondent is ordered to pay to each of the individual applicants an amount equivalent to two months' salary as compensation less the statutory deductions;
3. There is no order as to costs.

GN Moshwana,

Judge of the Labour Court of South Africa

Appearances:

For the Applicants : In Person

For the Respondent : Advocate E Coleman

Instructed by

: Clifford Levine Attorneys, Johannesburg.

[1] 66 of 1995, as amended.

[2] Automatic termination clause. Recently the LAC found that such clauses are lawful- Enforce Security Group v Fikile and others Case DA24/15 delivered on 25 January 2017.

[3] Own underlining and emphasis

[4] Section 193 (2) (d) of the Act.

[5]

[2015] 11 BLLR 1081 (LAC).

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