

SOUTH AFRICA / JUDGMENT

Motete and Others v Larskool Oos-Driefontein and Another (JS 428/20) [2023] ZALCJHB 38 (7 July 2023) [2023] ZALCJHB 38

COURT

Labour Court Johannesburg

BEFORE

S Mabaso

CASE / FILE NUMBER

JS 428/20

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THE LABOUR COURT OF
SOUTH AFRICA,
JOHANNESBURG
Not Reportable
Case No: JS 428/20

In the matter between:

LINEO GLORIA
MOTETE
1st Applicant
SERAME JOHANNES MOSES
MATLOU
2nd Applicant
GERTRUDE
SOMO
3rd Applicant
MPHALLA
SETHABA
4th Applicant
MOOKHO
MOTLHOIWA
5th Applicant
and
LAERSKOOL
OOS-DRIEFONTEIN
1st Respondent
SGB
2nd Respondent
Heard : 13
and 14 February 2023

Delivered:07 July 2023

JUDGMENT

MABASO, AJ

Introduction

[1] The Applicants collectively approached this Court asserting that their dismissal, based on operational requirements, by the Respondents was both procedurally and substantively unfair; consequently, they sought an order to reinstate them. In addition, the Fifth Applicant (Ms Motlhoiwa) incorporated a claim against the Respondents contending that she should be paid for 38.80 leave days that had accrued at the time of dismissal. The Respondents called for the dismissal of both claims with costs.

[2] On the first day of the hearing, this Court was advised that Mr Matlou (the Second Applicant) was since deceased, and the Applicant's Counsel was to be provided by the deceased's family with the necessary documentation for a possible substitution application. However, at the time of this judgment, none had been submitted, as the Counsel had not been favoured with such; consequently, the case for the Second Applicant is struck off the roll. Thus, hereinafter, reference to the Applicants is with the exclusion of the Second Applicant.

[3] Once all evidence has been tendered before this Court, it transpired that the issues for determination herein are thus:

(3.1) Whether the Respondents had valid reasons to retrench the Applicants, meaning, was the dismissal substantively fair?

(3.2) Whether the process followed by the Respondents in dismissing the Applicants was procedurally fair?

(3.3) If the dismissal was only procedurally unfair, what is an appropriate remedy under the circumstances?

(3.4) Whether the Respondents owe Ms Motlhoiwa any money for leave days, as mentioned above; if so, how much?

[4] The Respondents have the onus of proof relating to questions (3.1) and (3.2) since section 192(2) of the Labour Relations Act[1] (LRA), provides that employers are to prove the fairness of dismissals; whereas, Ms Motlhoiwa has the onus of proof relating to

question (3.4) as it is a claim that lies in the Basic Conditions of Employment Act[2] (the BCEA).

Was there a fair reason for the dismissal of any employees?

- [5] Following all the evidence tendered before this Court, it became clear that the following facts are common cause: the Applicants were employed by the Respondents, and the Second Respondent has a right to appoint staff, including the Applicants, on behalf of the First Respondent. The Gauteng Department of Education, subsidises the Second Respondent, twice a year, in May and November. This subsidy covers strictly learner-teaching material, municipality services, and maintaining “state buildings”; and in terms of the applied Regulations these funds “cannot be used for [Second Respondent’s] employed employees [including the Applicants]”.
- [6] It is not disputed that: the salaries of the Applicants were being paid from school fees generated income, as the sole witness for the Respondents, Ms Sara Veenendaal (Ms Veenendaal) testified that “the salaries can only be paid from the school fees from the parents” and are projected by looking at the number of learners and “work out a projected idea about what will be the income if the parents pay the school fees”. Consequently, the failure to receive school fees has a devastating effect on the finances of the Second Respondent. The Second Respondent held its Annual General Meeting in November 2019, wherein they discussed, among other things, the budget for the year 2020.
- [7] Moreover, it is a common cause that: in March 2020, there was a global pandemic, Covid-19, and the President of the Republic of South Africa announced a state of emergency, which consisted of a national lockdown. Consequently, several restrictive regulations were implemented, which affected the First Respondent as almost 99% of the learners' parents had the same employer, Sibanye Mine in Carletonville, which exercised the no-work-no-pay principle; as a result, the parents had no income.
- [8] From the first month of the lockdown, the First Respondent received fewer school fees than usual. The Second Respondent had no financial reserves, the school fees were the only stream of revenue, and there were no other additional sources. The First Respondent had no extra income, and it could only generate it through fundraising; regrettably, none could be done in 2020.
- [9] Furthermore, it became apparent during the trial that there was a decline in school fees collection between February and June 2020. By 9 June 2020, some of the employees were being owed partial salaries since March 2020. In April 2020, for example, some employees did not receive their salaries. Hence there was not enough money in terms of school fees where salaries are sourced. Consequently, Ms Veenendaal of Marius Botha Consultants (a company sourced by the Second Respondent, to handle human resources matters for them). Advised the First Respondent to consider a possible retrenchment process.
- [10] With what is stated under this rubric, this evidence points to one thing that indeed, the Respondents had financial challenges; therefore, there was a general need for the retrenchment process, as suggested by Ms Veenendaal. In short, there was a fair reason for the dismissal of some employees of the Respondents.

Was the dismissal procedurally fair?

[11] The next question is two-fold: whether the dismissal was procedurally fair and whether the Applicants were employees to be retrenched. Same as the above, in investigating this, this Court has to consider the evidence presented before it.

[12] If an employer anticipates retrenching any of its employees, section 189(3) of the LRA, directs that such an employer has to issue a written notice to the employees concerned inviting them to a consultation and for it to be a meaningful joint consensus-seeking process, such must disclose in writing among other things, the following:

- (a) 'the reasons for the proposed dismissals;
- (b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;
- (c) the number of employees likely to be affected, job categories in which they are employed;
- (d) the proposed method for selecting which employees to dismiss;
- (e) the time when, or the period during which, the dismissals are likely to take effect,
- (f) the severance pay proposed,
- (g) any assistance that the employer proposes to offer to the employees likely to be dismissed;
- (h) the possibility of the future re-employment of the employees who are dismissed;
- (i) the number of employees employed by the employer; and
- (j) the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months.'

[13] Upon the advice of Ms Veenandaal, the Respondents phoned the Applicants on 8 June 2020, inviting them to a meeting with the Second Respondent's representatives which was to take place the following day, on 9 June

2020. The purpose thereof was not disclosed to the Applicants. The meeting did take place, and Ms Veenandaal and Mr Botha represented the Respondents, wherein the Applicants learnt for the first time about the intention to retrench some of the employees and the reasons

advanced are as stated in paragraph 7 of this judgment.

[14] When Ms Veenandaal was asked, during cross-examination, why the section 189 (3) notice was not issued prior to this meeting, she said that the practice in their firm is "combined the first consultation with the handing out of the notice".

- [15] She further confirmed that the then Second Applicant made a proposal suggesting ways to avoid retrenchment of employees, such as to work for minimum wage, and also asked if the Second Respondent could be loaned money by the First Respondent but was told that it was not possible as “money from [Gauteng Department of Education] can't be used for [Second Respondent]”.
- [16] The Second Applicant did not say he was talking on behalf of fellow employees, and there was no trade union representative during this meeting. The Applicants were only issued with the section 189(3) notice immediately after the conclusion of the meeting on 9 June 2020. Ms Veenendaal, when pressed by Mr Navsa, for the Applicants, during cross-examination, further confirmed that the section 189(3) notice did not state the number of employees likely to be affected and the job categories in which they are employed.
- [17] Another meeting was to be held on 12 June 2020; however, prior to this meeting, the evidence presented before this Court indicates that the members of the Second Respondent had already made up their decision that dismissals were to take place should the Applicants not accept their proposal. This is according to the minutes of the meeting held on 1 July 2020, which partly reads thus “The employees who did not accept the proposal will be served with a formal notification of retrenchment within this week”; and Ms Veenendaal could not deny that such decision was taken before the meeting scheduled for 12 June 2020.
- [18] Further meetings were held, and on 15 June 2020, employees were given addendums to their contracts with what the Respondents wanted them to accept. The Respondents advised that those who did not want to accept the addendum to their respective employment contracts then were to be released.
- [19] The Applicants were not willing “to agree to the percentage of working hours as reflected in [the addendum]”, as Ms Motlhoiwa said the “money was too little to survive and we are no more receiving the UI19 monies”. As indicated in the preceding paragraph, the Respondents had already taken a decision as to which approach was to take place should the Applicants not accept their Respondents’ offers.
- [20] If a section 189(3) notice is not issued before a consultation to discuss possible retrenchment generally, the subsequent procedure is unfair, as employees are required to be given sufficient time to prepare for the consultation in order for it to tick some of the boxes of the joint consensus decision-making process. The Labour Appeal Court in *Johnson & Johnson (Pty) Ltd v Chemical Workers’ Industrial Union*[3] at para 31 held thus, regarding this point:
- ‘Mention has already been made that section 189 is inextricably linked to the issue whether a dismissal based on operational requirements is fair or not. In testing compliance with its provisions by determining whether the purpose of the occurrence of a joint consensus-seeking

process has been achieved or frustrated, a finding of non-compliance by the employer will almost invariably result in the dismissal being unfair for failure to follow proper procedure. It is difficult to envisage a situation where the result could be different.

Non-compliance would not, however, necessarily result in the dismissal being substantively unfair, as the facts of this case show.’

[21] Considering how the first meeting was conducted, in that, no notice was issued prior to it as it is common cause that the Applicants were only given the notices after the meeting had been concluded; and were still expected to make representations as indicated above. Clearly, the evidence presented before this Court indicates that the purpose of the meeting of 9 June 2020, was not to issue the Applicants with the section 189(3) notices but, as correctly conceded by Ms Vannedaarn, that some of the employees made suggestions and it was the first consultation. Consequently, this Court concludes that since the Respondents failed to follow the route as envisaged by section 189(3), the dismissal was procedurally unfair.

[22] In short, there is no requirement that the parties should reach an agreement as the purpose of the consultation is to discuss retrenchment; in this matter, considering the conclusion in paragraph 17 above and the conduct of the Respondents as highlighted in paragraph 13, it results to one conclusion that it was not willing to hear further suggestions from the Applicants and it approached the meeting of 12 June 2020 with a final decision, not a provisional decision as normally accepted. This is also supported by what the

Applicants say took place on 15 June 2020, which is not disputed because the sole witness of the Respondents said she was not involved

therein and the Respondents opted not to call people who were involved in meetings post-12 June 2020. Furthermore, the evidence

before this Court, considering what is also stated in paragraph 19 and that the affected employees were those referred to during the trial as "employees of the Second Respondent", which were the Applicants, the employees to be dismissed were the Applicants.

The issue of Ms Josephina Motlhoiwa

[23] It is common cause that: her employment runs from 1 January 2018, until the date of dismissal, June

2020. This Applicant entered into a signed agreement which indicates that she has 21 consecutive days for every 12 months of the contract and 21 paid vacation leave for the duration of the contract; it is also stated that “the periods when the institution is closed are deemed to be leave period”. The First Respondent has four holidays period: March-April, June-July, October and December. In 2020, the First Respondent was closed for three weeks.

- [24] Initially, she claimed that she was owed payment for 38.8 leave days. During cross-examination by Mr Hauptfeisch for the Respondents, when it was put to her that it was impossible and her reliance was on what the payslip stipulated and was a mistake, she did not dispute this. Moreover, her version changed in that she confirmed that every year she would enter into a new contract of employment, which is similar to the one presented before this Court and that fellow Applicants signed similar employment contracts.
- [25] In the year 2018-2019, Ms Motlhoiwa, took all her leave days. She changed and said she was being owed 21 days from 1 January 2020; however, when told that in that year, there was a period where she was on leave due to the Regulations mentioned above, she accepted the version of the Respondents but later changed her version and said that on some other days, she was asked to attend to work, without stating which days during the Covid-19 restrictions.
- [26] This Court has properly applied its mind to the facts of this case; most importantly, Ms Motlhoiwa does not deal with the latter version in both her statement of case, and there is nothing in the pre-trial minutes which indicates such; if that were the case, Ms Motlhoiwa would have stated the same in the statement of case. Cf. *Chester Wholesale Meats (Pty) Ltd v National Industrial Workers Union of SA & Others*[4].
- [27] So, clearly, this Court accepts that the issue of leave days was an error and Ms Motlhoiwa saw an opportunity to try her luck. As a result, this Court accepts that Ms Motlhoiwa's claim has to fail in that she failed to present a case in support of the pleaded case; therefore, the Respondents version that it was an error and that this Court has to take into account fellow Applicants payslips. What also confirms this finding is that all other Applicants have similar contracts of employment and had no outstanding leave days.

Remedy

- [28] Since this Court has concluded that the dismissal was only procedurally unfair, this Court has to make a compensation order that is just and equitable considering all the circumstances of this, which include that the reason for the dismissal was the Covid-19 pandemic, which even affected the global economy; meaning it was not only the parties herein that were affected, the number of years that each Applicant worked; further that the Respondents relied on the services Marius Botha Consultants, to conduct the retrenchment process and the reason why the procedure was not followed was that Marius Botha Consultants did things in a different way as indicated above.
- [29] Consequently, this Court concludes that the following order is appropriate:
- [30] Order
1. The Applicants' dismissals by the Respondents were substantively fair but procedurally unfair;

2. The Respondents are ordered to pay each Applicant compensation that is equivalent to 3 months' remuneration, calculated from the date of dismissal; the amount per each Applicant is as follows:
 - (a) First Applicant - R16 050.00;
 - (b) Third Respondent - R9 000.00;
 - (c) Fourth Applicant - R9 000.00; andFifth Applicant - R19 500.00.
3. The amount in order 2 above is payable within 15 days of this Order.
4. The Fifth Respondent's claim for outstanding leave days is dismissed.
5. The Second Respondent's claim is struck off the roll.
6. Each party is to bear its own costs.

S Mabaso

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Adv Z Navsa

Instructed by: Pro bono office, SASLAW Gauteng

For the Respondent: Mr R Hauptfleisch

Instructed by: Raymond F Hauptfleisch Attorneys

[1] Act 66 of 1995, amended.

[2] Act 75 of 1997.

[3] (1999) 20 ILJ 89 (LAC); [1998] 12 BLLR 1209.

[4]

(2006) 27 ILJ 915 (LAC); [2006] 3 BLLR 223 (LAC) at para 19.

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