

SOUTH AFRICA / JUDGMENT

Solidarity obo Benade v Ultimate Aim Business Division (Pty) Ltd (JS732/20) [2024] ZALCJHB 213 (28 May 2024)

[2024] ZALCJHB 213

COURT

Labour Court Johannesburg

BEFORE

MP Kumalo

CASE / FILE NUMBER

JS732/20

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THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case

No: JS

732/20

In

the matter between:

SOLIDARITY obo FJ
BENADE Applicant
and
ULTIMATE
AIM BUSINESS DIVISION (PTY)LTD
Respondent
Heard
03 May 2024

Delivered:

28 May 2024
(This
judgment was handed down electronically by emailing a copy to the
parties. The 28 May 2024 is deemed to be the date of delivery
of this
judgment).

JUDGMENT

KUMALO, AJ

[1] The Applicant in this matter is Solidarity Trade Union, the Respondent is Ultimate Aim Business Division (Pty) Ltd. The matter came before court for trial on 25 April 2024 and proceeded on a default basis as the Respondent failed to attend.

[2] Counsel for the applicant handed up correspondence which the Applicant's attorney of record addressed to the Legal

Representatives of the Respondent as well as the Respondent personally. I am therefore satisfied that the Respondent and its legal representatives were duly notified of the date of the trial but chose not to attend for reasons known only to them.

[3] The Applicant called only one witness to testify Mr. Francios Jacob Benade (Benade). Benade testified that he was employed by the Respondent from 1 October 2017 until July 2020 as its Chief Executive Officer.

[4] The salient features of the contract entered into between the parties stipulated that it is subject to the Basic Conditions of Employment

Act[1] (BCEA). Further, Benade would be remunerated at R76,000.00 per month and his salary would only be reduced should he be demoted because of disciplinary action. It further stipulated that should the Respondent contemplate retrenchment, it would follow the guidelines in section 189 of the Labour Relations Act[2] (LRA). It further stipulated that the employee would be paid severance pay equal to one week of remuneration for each completed year of service.

[5] During his tenure as an employee of the Respondent, Benade lodged a formal grievance which pertained to the fact that he was not paid his salary in accordance with his contract of employment.

[6] He testified that he is owed an amount of R1,974,397.62 computed as follows:

6.1 Notice pay:

R76,000.00

6.2 Severance pay: R37,079.00

6.3 Outstanding salaries: R1,863,318.00

[7] To this end, the Applicant referred to a payment schedule or table indicating the amounts that the Respondent failed to pay Benade during his tenure as an employee of the Respondent.

- [8] In its statement of response, the Respondent alleged that Benade was offered shares in compensation for a reduced salary. Benade testified that he never received shares and his reasons for not accepting the shares was due to the fact that the evaluation of the shares was never done and accordingly, the value of the shares was not determined.
- [9] On 15 July 2020, Benade received a termination of service letter wherein the Respondent alleged that the economy has placed it in a precarious position where it had to make difficult decisions in order to ensure its continuation and the letter served to inform Benade of his four weeks' notice for the termination of his employment.
- [10] To this end, the Respondent offered to pay Benade a total amount of R1,192,540.84 computed as follows:

13.1 IRP5 for the 2019 tax year:

R 392,258.00;

13.2 IRP5 for the 2020 tax year:

R 87,782.84;

13.3 Bierberg share certificate for 1,5% R 412,500.00; and

13.4 Cash:

R 300,000.00.

- [11] Benade testified that notwithstanding the aforementioned amounts not complying with the statutory requirements of the BCEA, the Respondent did not pay this amount and has yet to pay.

- [12] Although the Respondent purported to be retrenching Benade, he was neither issued with a section 189 letter nor engaged in any consultation process as required by the LRA. He was never provided with the Respondent's financial statements to investigate

whether the Respondent did in fact have a bona fide reason for dismissing employees due to operational requirements. He was simply confronted with the dismissal letter.

- [13] He confirmed that he was not the only employee to be dismissed but had no idea of the number of the employees affected.

- [14] The Applicant referred a dispute on behalf of Benade on 31 July 2020 for an unfair dismissal and subsequently on 9 October 2020, wrote a letter of demand for the payment of the amounts referred to above. To date, the Respondent has not paid Benade any amounts including the amount it offered above.

- [15] In casu, this court is required to make a determination whether the Applicant's dismissal due to the Respondent's operational requirements was substantively and procedurally unfair and whether the Applicant is entitled to the statutory payments as envisaged in the BCEA.

- [16] It is unfortunate that the Respondent opted not to grace the hearing of this matter and give its side of the events. What this court has is the uncontested version of Benade's evidence on all aspects of this case supported by the documents provided.
- [17] On the question whether the Applicant's dismissal due to the Respondent's operational requirements was substantively and procedurally unfair, the answer must be affirmative. It is clear from the evidence of Benade that there was no consultation process embarked upon by the Respondent before deciding to dismiss for operational reasons.
- [18] In the matter of SA Revenue Services v CCMA and Others[3], the Labour Appeal Court (LAC) held as follows:
- "it bears mention that, often, too much is made of the distinction between substantive and procedural unfairness. The distinction is a useful forensic tool, not a principle of law creating two separate concepts. The distinction ought not to be made to do work which distorts its usefulness. Sometimes a defective and thus unfair procedure may taint an inquiry so as to prevent a fair decision on a substantive issue from being taken. Sometimes an unfair procedure does not get in the way of discerning a substantively fair dismissal."*
- [19] The Respondent failed to enter any form of joint consensus seeking process as envisaged by section 189 of the LRA and to avoid his dismissal. There is no evidence to indicate that it engaged meaningfully with Benade on any of the issues relevant in such matters. It therefore must follow that his dismissal was both procedurally and substantively unfair.
- [20] Benade's contract of employment made provision how the employer may deal with his possible retrenchment. It made provision that in such circumstances, the employer shall follow the guidelines contained in section 189 of the LRA. Further, the employee would take note that in the event of him being affected by retrenchments, the employer may apply a selection criterion based on his disciplinary record, absenteeism, skills and performance.
- [21] Other than some allegation in its statement of defence that he was demoted due to poor performance, there is no evidence that he ever was engaged on such issues, or that he had disciplinary issues. This court must therefore accept that there were no disciplinary or performance issues regarding Benade.
- [22] More importantly, the parties' employment contract made provision that should the employee's services be terminated as a result of retrenchment, and unless the provisions of section 41(4) of the BCEA apply, the employee shall be paid severance pay equal to one week's remuneration for each completed year of service with the employer.
- [23] In terms of section 41(4) of the Basic Conditions of Employment Act (BCEA), an employee who is dismissed for operational requirements is not entitled to severance pay if the employee "unreasonably refuses to accept the employer's offer of alternative employment with that employer or any other employer".

[24] Clearly the above is not applicable to Benade. There is no evidence to suggest that he unreasonably refused to accept an offer of alternative employment. In fact, the termination letter given to him made no mention of an alternative position with the company.

[25] It is therefore this court's finding that there was no justifiable reason for the Respondent to reduce Benade's salary as it purported to do.

[26] In so far as the matter related to outstanding salaries that he is owed, Benade submitted a table that tabulated what he was paid and what is still outstanding. Proof thereof was submitted in the form of payslips and the amounts deposited into his bank account as his salary over the period of his employment with the Respondent. Absence any evidence to suggest otherwise, this court must accept that he has discharged the burden of proof placed upon him and has therefore proved that he is owed the amounts he claims.

[27] In the circumstances the following order is made:

Order

1. The Applicant's dismissal due to the Respondent's operational requirements is found to be both procedurally and substantively unfair;
2. The Applicant is entitled to the statutory payments as envisaged in the Basic Conditions of Employment Act read together with the employment contract entered into between the parties dated 26 September 2017;
3. The Respondent is to pay Mr. FJ Benade an amount of R1,974,397.62 calculated as follows:

3.1 Notice pay:

R76,000.00

3.2 Severance pay: R37,079.00

3.3 Outstanding salaries: R1,863,318.00

4. The Respondent is to pay the costs of this matter.

MP Kumalo

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. C. Dames

Instructed by: Serfontein Viljoen & Swart Attorneys

For the Respondent: No appearance

[1] No. 75 of 1997.

[2] No. 66 of 1995, as amended.

[3]

(2016) 37 ILJ 655 (LAC) at para 33.

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Prepared on 12 October 2026 · Esheria