IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD IN DURBAN

Case Number: DA 1/98

In the matter between

ROHAN PARBANATH
and
LEVER POND'S (PTY) LTD
–

JUDGMENT

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[1] This is an appeal from the industrial court to this Court in terms of the transitional arrangements set out in **section 22 of schedule 7 to the Labour Relations Act 66 of 1995** ('the new Act"). In terms thereof the matter must be dealt with in terms of the **Labour Relations Act 28 of 1956** ("the old Act").

[2] The industrial court found that the appellant had been unfairly dismissed and ordered the respondent to pay him compensation in the sum of R 18 600.00, the equivalent of six month's salary. The appeal is directed against the form of this relief: the appellant seeks reinstatement, not compensation.

[3] The respondent led no evidence on the issues relating to the kind of relief that should follow upon a finding that the appellant was unfairly dismissed. Appellant gave evidence that he had been employed from early 1990 until his dismissal by the respondent at the end of 1995. At that time he was earning a salary of R 3 100.00 per month. He was not cross-examined on the basis that he had not properly performed his functions during that period, nor was it suggested to him that there would be any difficulty in reinstating him.

[4] What the appellant was dismissed for was that he allegedly stole a lawnmower from the respondent. The industrial court found that it was not shown that the appellant did, in fact, steal the lawnmower. Consequently the matter should be approached on the basis that he was not guilty of theft.

[5] The presiding officer in the industrial court considered three factors to be important in deciding to award compensation instead of reinstatement. Each will be dealt with in turn.

[6] The first was that "it will be unjust to impose a sanction of reinstatement, as the time period that has expired since the [appellant's] dismissal during November 1995 to present is so long that it would impose tremendous difficulties on the Respondent to make provision for [his] return". The respondent led no evidence to this effect, nor was the possible difficulty even canvassed in the cross-examination of the appellant. While the length of the delay between dismissal and a court hearing is self evident, the difficulty in reinstating an employee is not. It might conceivably present no problem at all. There is, in my view, no justification to assume that reinstatement will be difficult where there is nothing on record to that effect.

[7] Reference was also made in the judgment of the presiding officer in the industrial court to the appellant's failure to explain why "a three month period elapsed, during which this matter was not pursued at all". The appellant was dismissed on 14 November 1995. He requested a conciliation board meeting on 28 March 1996 and the conciliation board was established on 3 April 1996. Conciliation failed and the proceedings in the industrial court were initiated on 16 August 1996. It is not clear to which period reference was made in the judgment, but, apart from that, once again the delay, its cause and its effect were not raised and debated in evidence or in the cross-examination of the appellant. Without that, as is the case with the effluxion of time, there is no factual foundation upon which to make an automatic finding adverse to the appellant.

[8] After his dismissal the appellant sought other employment. On 10 June 1996 he obtained employment with Pepsi Cola, which lasted until May 1997 when the company (or at least its South African front) was liquidated. At Pepsi he earned a salary of R 3 500.00 per month. The salary he received was slightly more than he had received at the respondent. The appellant was cursorily cross-examined on this aspect, the suggestion being that he would have remained at Pepsi had it not been liquidated.

[9] The appellant did not concede that he would have remained at Pepsi had the latter not been liquidated. The relevant portion in cross-examination on this aspect reads as follows:

> **"Okay. That's what the question I put to you. So had Pepsi Cola not been liquidated, you would be employed today at a greater salary than what you earned at Lever Brothers?**

.... I am not sure.

> ***Okay, on your evidence, you said that you earned R 3 100.00***

.... Okay, right.

You would still be employed today and you would probably want to stay there?

---Yes.

> **Okay. So if the Court finds that your dismissal was unfair, what do you - ow do you comment to my argument that the Court should only compensate you from November '95 to May '96? Can you comment on that? If you don't want to comment, you can say, "No comment"? --- no, I wouldn't take it for .... (Inaudible).**

Would you want Lever Brothers to pay you after your job at --- for the period after -

that you lost your job at Pepsi?
Would you want Lever Brothers - if the Court finds that your dismissal was unfair and the Court decides to award you compensation, would you expect the Court to award you compensation for the period after liquidation of Pepsi, that is from May this years onwards? --- thank you.

No further questions, thank you".

If the italicised portion clearly referred to the work at Pepsi there might have been substance to the submission that he conceded the point, but it does not. The appellant earned R 3 100.00 whilst working for the *respondent*, not as an employee at Pepsi.

[10] There is no other basis on record to conclude that the appellant abandoned his claim for reinstatement whilst working for Pepsi. He initiated proceedings in the industrial court for reinstatement (not compensation) whilst he was employed by Pepsi; conduct which can hardly be described as consistent with a desire not to return to his erstwhile employment.

[11] The mere fact that appellant might have continued working at Pepsi had it not been liquidated (which was not conclusively established in cross-examination) is not, in itself, sufficient reason for refusing reinstatement. The presiding officer in the industrial court implied that it was, saying that the respondent could not be penalised "because of the fact...that...Pepsi Cola was liquidated." Appellant's continued employment with Pepsi would preclude reinstatement only if it was shown that such employment effectively amounted to a waiver by the appellant of his claim to reinstatement. To establish such a waiver would be difficult in circumstances where an employee who has been unfairly dismissed, is nevertheless under a duty to mitigate his possible damages by seeking alternative employment until he obtains the necessary redress. No clear evidence to establish such a waiver was presented in the industrial court. The cross-examination of the appellant on this aspect elicited, at best for the respondent, an ambiguous reply. The appellant's consistent insistence on reinstatement as the sought-after relief for his unfair dismissal points the other way.

[12] The factors relied upon in refusing reinstatement are thus, in my view, not persuasive. No other compelling reason can be advanced for refusing reinstatement.

> "Where an employee is unfairly dismissed he suffers a wrong. Fairness and justice requires that such wrong be redressed. The Act provides that the redress may consist of reinstatement, compensation or otherwise. The fullest redress obtainable is provided by restoration of the ***status quo ante*****. It follows that it is incumbent on the Court when deciding what remedy is appropriate to consider whether, in the light of all proved circumstances, there is reason to refuse reinstatement."** (per Nicholas A J A in ***NUMSA v Henred Fruehauf Trailers (Pty) Ltd*** **1995 (4) SA 465 (A) at 462J-463A; (1994) 15 ILJ 1257 (A) at 1263C-D)**

[13] The appellant should therefore have been reinstated in his employment with the respondent.

[14] The appeal succeeds with costs. Para (i) of the order in the industrial court is confirmed, but para (ii) is set aside and replaced with the following:

"ii. The respondent is ordered to reinstate the applicant in its employ on the terms and conditions that obtained at the date of his dismissal".

[15] The appellant is to present himself for reinstatement at the respondent within 14 days of the date of this judgment. The reinstatement is to operate from the date of the industrial court order being 27 November 1997.

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Froneman D J P

I agree

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Myburgh J P

I agree

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Cameron J A

Date of Hearing: 13 August 1998
Date of Judgment: 14 August 1998

Counsel for Appellant: Mr S M Govender instructed by Jay Reddy
Counsel for Respondent: Mr A E Franklin instructed by Deneys Reitz