IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN CASE NO: J2561/00
2002-02-14

In the matter between

WILLEM JOSEPH DELPORT Applicant

and

PARTS INCORPORATED AFRICA OF GENUINE PARTS (PTY) LTD Respondent

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J U D G M E N T

WAGLAY J:

The applicant was dismissed by the respondent on the grounds of its operational requirements on 30 March 2000. Applicant claims that his dismissal was both procedurally and substantively unfair. The relief sought by the applicant is compensation. Applicant's dismissal is common cause.

The respondent is burdened with the onus of satisfying this court that the dismissal of the applicant by it was effected for a fair reason and in accordance with fair procedure. In this matter not only did the applicant allege his dismissal did not comply with Section 189, but that the retrenchment was simply an excuse employed by the respondent to terminate his employment, because Knoesen the branch manager at the branch at which applicant was employed by the respondent,

wanted to get rid of him. Applicant has alleged that his dismissal was tantamount to victimization or as now argued by his counsel that it was motivated by ulterior motives.

I do not in this judgement seek to set out in detail all the issues raised by the applicant which in his mind created the impression that there was a calculated attempt on the part at least of Knoesen, to ensure that his employment with respondent came to an end. In relation to this aspect the evidence of Knoesen, Espenoza the regional managing director of respondent and the applicant is relevant. These three witnesses all came across as honest and reliable witnesses. Yes, they disagreed about various matters. These disagreements were not disagreements that were based on any dishonest belief or intention, it related to perception and belief and the answers given by each one of them was not such that having regard to the prevailing circumstances can be said to be dishonest. It is clear that both Espenoza and Knoesen thought applicant a difficult employee. Yet I am satisfied that they did not either collectively or individually seek to conspire or hatch a scheme to rid applicant from respondent's employ. At the same time the rapidly changing structures within respondent did create tension within the workplace particularly when regard is had to the respondent's avid grabbing of competitors and spitting out employees once amalgamation had taken place. In these circumstances it is understandable that applicant would feel insecure, more so since he is moved from one work station to another within relatively short periods of time.

Applicant's claims that he was being watched, that he was

requested to make proposals with respect to efficiency and effectiveness and then his proposals were met with sarcastic response, his application for senior post was not met with any response despite his belief that he was qualified for such posts, and other complaints collectively point to an attempt to frustrate him. Seen individually though none of these complaints are out of the ordinary in any work environment. In all these respects explanation given by the respondent are not only plausible but to my mind honest and therefore I cannot find that there was any attempt to victimize the applicant or that the disagreements created a pattern that served as a motivation to get rid of him. The fact that his dismissal was not as a result of any ulterior motive, does not however make his dismissal fair.

While applicant did allege that his dismissal was consequent upon him being victimized or motivated by other matters, his case is also that his dismissal was unfair because as recorded in the supplementary pre-trial minutes, there was on the part of the Respondent neither a general need to retrench nor a need to specifically retrench him and that respondent failed to comply with Section 189 of the Act. In terms of Section 189(1) Once the employer contemplates dismissing one or more employee on the grounds of its operational requirements, consultations must be held with the employees likely to be affected by the proposed dismissal.

Sub-section 2 then sets out what it is that the parties must consult about and sub-section 3 places certain obligations upon the employer regarding the information they should provide the employees being consulted. This section seen as a whole

contemplates that once the employer believes that he has to terminate the employment of any employee for operational requirements, it needs to collectively meet with its employees within the category of employees from which category it seeks to minimise the staff complement.

Explaining the above by way of example, once an employer decides --due to severe downturn in his turnover or that at least two of his 10 drivers have no work to perform as drivers, he must inform the drivers collectively that he is considering reducing his driving staff by two and would therefore wish to commence a consultation process with all of them. The reason to meet with all 10 drivers is that there may be amongst the 10 drivers one who may decide that he no longer wishes to remain in employment and perhaps another may be able to secure other employment, or still another may decide that he no longer wishes to continue driving, but wishes to perform clerical duties and would happily if qualified for the post, assume the clerk's position which is vacant. It may also be possible that the drivers tell the employer that they believe the position that obtains is temporary and for a period of six months they are prepared to take a drop in salary collectively so that the impact of the loss in trade is minimized. These are just some examples. What it demonstrates is that, that in order to be fair consultations had to take place with all of the employees within the affected category.

In the matter before this court what we have is Knoesen's identification that there was one supervisor too many within respondent's warehouse structure. This is accepted by

Espenoza, his senior. It is the next step which is problematic. In good faith Knoesen and Espenoza decide that since there is one supervisor too many and the policy of the company is to apply LIFO (The retention of skills was not relevant as all supervisors did relatively the same work) the applicant was the one who having the shortest service and was the one who would have to go.

They believed that what they therefore were required to do was to commence a consultation process with the applicant alone. This is not the process contemplated by Section 189. Having identified that the number of supervisors had to be reduced to 5 from 6 because of the changes it wished to give effect to with regard to returns being referred to various departments, what the respondent was required to do was to consult with all six of the supervisors.

The end result may not have been different but that is not the issue. The issue is that the consultations may have led to someone voluntarily deciding to no longer continue in the service or to remain in the position of supervisor. Furthermore, the respondents stated that there were vacancies within the respondent's company for which the applicant was not a suitable candidate. Had the respondent consulted with all of the supervisors, was one of the others not suitable and willing to take the vacant post? We do not know the answers to this question. These are issues which is what is required to be dealt with in consultations. An employer cannot select an individual and then say let us talk about how we can avoid your dismissal.

Section 189 speaks of consultation to avoid dismissal, it

contemplates consultations not with an individual from amongst a category of employees, as such consultations would in fact be meaningless, because it is generally very unlikely that discussions could seriously take place to avoid a dismissal if a prospective retrenchee could suitably be replaced elsewhere. He would be advised of a transfer then, not a possible dismissal.

In this case the respondent's decision to reduce the supervisors from six to five was based for good reason. It cannot be said therefore that there was no need in general to retrench one supervisor. However, respondent's failure to consult with all of the supervisors and to select the applicant simply because respondent's policy dictated LIFO as the criteria tainted the process. The issue of selection only comes to play when during the consultation process it becomes evident that dismissal is inevitable.

Because of respondent's failure to consult with all of the supervisors I cannot be satisfied that the dismissal of applicant was substantively fair despite my finding that good grounds existed to reduce the number of supervisors. This is so because I do not know that one of the other supervisors might not have left or apply successfully for the vacant post within respondent's enterprise.

In the circumstances I am not satisfied that the dismissal of the applicant was fair. The relief sought by the applicant is compensation. The granting of compensatory relief is discretionary. Where dismissal is found to be unfair it does not automatically mean that compensation should be granted

where the wronged party does not seek reinstatement. This discretion must however be exercised judicially. In *Johnson & Johnson* the labour appeal court held that where the employer has, having discovered its error, sought to rectify its mistake and is not given an opportunity go make amends then notwithstanding the unfairness of the employer's decision compensation should be refused. This matter does not fall within that category.

However the above is not the only circumstances in which compensation can be refused. This court can take into account other factors: whether or not the respondent had found alternative employment; the respondent himself; the length of service etc. Having regard to all these issues, it has not been an easy decision to make as to whether compensation should be awarded. What makes the decision even more difficult is that all of the witnesses who appeared before me were honest and helpful. The respondent's witnesses, believing their actions were proper and correct, and the applicant and his witness properly holding the view that the respondent was incorrect.

Had the parties simply taken or heeded what was said by Croucamp who gave evidence for the applicant, this matter would have been resolved much earlier. He quite properly was satisfied that there was no victimization and also satisfied that the respondent had not correctly complied with Section 189 in affecting the dismissal. In the end I believe that the balancing of the scales requires that applicant should be granted compensation consequent upon his unfair dismissal. The amount of compensation I am obliged to give having decided

that compensation should be awarded, is an amount equal to 12 times the monthly salary applicant earned at the time of the dismissal.

At the time the applicant was dismissed he earned as it appears to be common cause in the pre-trail minute R9 500 per month. Applicant however argued that respondent had underpaid him and that his gross salary should have been an amount of R13 500 per month. This was not pursued by counsel for the applicant in argument and quite properly so. In this regard the evidence given by the applicant was that an agreement was concluded between him and Espenoza that he should receive an amount of R13 500 per month when he was transferred to the dispatch department. Espenoza denied that such agreement Croucamp's evidence in this respect was not helpful, while it is true that applicant in correspondence forwarded to Espenoza complained about the failure to comply with the agreement Espenoza's response was that no agreement was concluded. If anything and at best for the applicant he would only have agreed to receive an increase in salary after a three month probation period.

With regard to this issue I do not know where the truth lies. Both versions are equally believable, however the *onus* in this respect is upon the applicant to satisfy me that such agreement was actually concluded and I am not satisfied that this was so.

In the circumstances I am satisfied that the amount of compensation must be calculated on the basis of applicant's salary of R9 500.

This then brings me to the issue of costs. This trial should have lasted not more than one day. It has lasted many more. Most of the time was spent dealing with the issue of victimization but cost in this court does not as a matter of course follow the result in that the court has a discretion to grant cost based on equity and law. I am satisfied that in this matter had the issue of victimization not been raised substantial costs would have been saved. Having regard to the issues raised by the applicant and not forgetting the amendment sought by the applicant which I shall deal with later and the peripheral issues I am satisfied that there should be cost awarded against the respondent, but that these costs should be limited to 25% of the total party and party bill.

With regard to the amendments made by the respondent to the effect that the respondent breached the agreement in failing to offer applicant a vacancy within 6 months of this retrenchment which was for a similar position, here again applicant was required to satisfy the court that there was a breach. It failed to do so. On the evidence before me there was in fact no breach. I mention this because this is one of the issues which I have taken into account in considering the determination of the issue of cost.

In the result I make the following order:

1. The dismissal of the applicant was unfair.
2. Respondent must pay the applicant compensation in the amount of R114 000.

3. Respondent is liable for 25% of applicant's cost of suit.

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WAGLAY J