IN THE LABOUR COURT OF SOUTH AFRICA
REPORTABLE
HELD AT DURBAN
CASE NO: D893/00

In the matter between:

J DE LAAN **Applicant**

and

VAN DYCK CARPERT COMPANY **Respondent**

JUDGMENT

MASERUMULE AJ:

1. This matter comes before court as a referral in terms of section 191(5) of the Labour Relations Act, 66 of 1995("the Act"). The applicant alleges that his dismissal by the respondent for operational reasons was procedurally unfair.

2. At the commencement of the trial, I drew the attention of the parties' legal representatives to the fact that the applicant's referral of his dismissal dispute to this court was made outside the ninety-day period prescribed by section 191(11) of the Act and that such late referral had not been condoned. The certificate of outcome was issued on 29 November 1999. The statement of case was served on the respondent by telefax on 29 September 2000 and filed with the registrar of this court on 3 October 2000. The period prescribed by the Act expired on 27

February 2000. The referral is thus 214 days or just over seven months late.

3. The parties agreed that the matter should proceed on the basis that the applicant would make an application for condonation at the commencement of the trial, and would give *viva voce* evidence in support thereof, and would simultaneously address the merits of the dispute, so as to enable the court to make a proper determination regarding his application for condonation. The court would then make a decision on the application for condonation after hearing all the evidence, including evidence in rebuttal from the respondent.

4. I am of the opinion that Section 158(h) of the Act, read with Rule 11 of the Rules of court, permits such a procedure. Section 158(h) confers general powers on the court to condone non-compliance with any time period prescribed by the Act. Rule 11 prescribes the procedure that must be followed in respect of applications incidental to or pending proceedings instituted by a party. The rule requires such applications to be by way of affidavit and to be supported by an affidavit. This is in contrast to Rule 12, which deals with applications for non-compliance with the rules themselves but in respect of which the procedure for bringing such an application is not prescribed.

5. The court is a superior court with authority and inherent powers in relation to matters falling under its jurisdiction, section 151 of the Act. The court's inherent powers include the power to regulate its procedures in the interests of justice, see *Landman & Van Niekerk: Practice and Procedure in the Labour Courts*, Butterworths, A-2. Rules of court must be interpreted and applied in such a way that they facilitate the work of the court and promote the inexpensive and expeditious resolution of disputes, see *Landman & Van Niekerk*, s*upra*, D-1.

6. In the present matter, the respondent did not raise a point *in limine* in its response to the statement of case relating to the

later referral of the dispute to the court. The point raised in the reply related to the alleged absence of jurisdiction by the CCMA to conciliate the dispute and issue a certificate of outcome. This point was also raised in the pre-trial minute but abandoned before the trial commenced. The late referral of the dispute was not raised in the pre-trial minute as a point in limine. The parties came to court prepared to deal with the merits of the dispute. In the circumstances, although Rule 11 requires an application on notice supported by an affidavit, dealing with the matter by way of an application from the bar supported by the applicant's viva voce evidence served the same purpose as what Rule 11 is intended to achieve. It also meant avoiding additional expense associated with a postponement to allow for an application that complies with Rule 11 as well as ensuring that the dispute between the parties was resolved. Taking into account that the applicant had been retrenched in June 1998, that the referral to court was made in August 1999, that in all other material respects, the matter was ripe for trial, and the delay that a postponement would cause, I deemed it expedient and in the interests of justice to deal with the application for condonation as part of the trial.

7. I therefore, first deal with the application for condonation for the late referral of the dispute to court, adopting in the process, the approach in *Melane v Santam Insurance Company Limited* 1962 (4) SA 531 (A). This means that the court must look at, inter alia, the period of delay, the explanation tendered for such delay, the prospects of success on the merits of the dismissal dispute and the importance of the matter.

8. Prior to dealing with the evidence led at the trial, it is necessary to first refer to the agreement reached by the parties as recorded in the pre-trial minute. The material common cause facts recorded therein are that:

8.1 The applicant commenced employment with the respondent on

1 June 1986;

8.2 The applicant and other employees of the respondent were retrenched on 30 June 1998;

8.3 The applicant was at all material times a member of Southern Africa Clothing and Textile Workers Union ("the union");

8.4 The retrenchment of the applicant and other employees was preceded by consultations with the union, with which the respondent was obliged to consult;

8.5 The respondent did not consult personally with the applicant;

8.6 As part of the consultation process, the respondent and the union agreed that voluntary retrenchments would be considered first prior to compulsory retrenchment;

8.7 Some employees, including one Padayachee, applied for voluntary retrenchment which was accepted, and as a result of which the applicant was not then identified for retrenchment;

8.8 Padayachee thereafter, but before the finalisation of the consultation process, withdrew his application and the respondent accepted such withdrawal;

8.9 As a result of the withdrawal of Padayachee's application and the respondent's acceptance thereof, the applicant was thereafter identified as a retrenchee by the application of the selection criteria.

9. The pre-trail minute went on to record that the issues in dispute and which the court would be required to deal with are:

9.1 Whether or not Padayachee's application for voluntary retrenchment was accepted by the respondent prior to the applicant being identified as a retrenchee by the application of the selection criteria; and

9.2 Whether or not the respondent was obliged to consult with the applicant personally in regard to his dismissal.

10. The applicant then testified that he had been on sick leave from 17 June 1998 and returned to work on 20 June 1998. He worked his shift from 06h00 until 15h30 when he was called to the office of Mr Deveraj Naidoo, the factory manager. According to the applicant, Naidoo told him that he was being retrenched, that he did not have to work until 30 June 1998 and that he must there and then leave. He went to the office of Ms Heidi Brown, the then Human Resources Manager, and was given a certificate of service, which is dated 30 June 1999. He was thereafter escorted from the factory. He subsequently went to his present attorney of record. He referred a dispute to the CCMA concerning his retrenchment. (I pause here to mention that the referral to the CCMA was some two and a half months late but the CCMA condoned the late referral) He attended at the CCMA on 29 November 1999 when the certificate of outcome was issued, following respondent's non-appearance. The reason for the delay in referring the matter to court was because he had no money.

11. The applicant also testified that he had the longest service in his department, as opposed to Themba Makhanya, a fellow supervisor and Naidoo, to who the applicant referred to as a supervisor as well.

12. Under cross-examination, the applicant initially repeated that the delay in referring the matter to court was because he did not

have money. He, however, later said that after attending at the CCMA on 29 November 1999, he took the certificate of outcome to his attorney on the same day, who told him that he would refer the matter to this court. Thereafter he did not make any enquiries from his attorney as to the progress of his matter until he received a letter from his attorney in May 20002, attaching the notice of set down for trial. The applicant also said because of the stroke that he had suffered earlier, and which had led to his sick leave in June 1998, he was not well and was admitted to hospital for three days in 1999, for another three days in 2000, three days in August 2001 and again at the beginning of August 2002. The applicant further testified that his children, who only started working in August 1999, are the ones who assisted him with money to pursue the litigation against the respondent.

13. Under re-examination, the applicant for the first time stated that he had also gone to the Legal Aid Board after reading about it in the papers. He was made to fill forms and come back on three different occasions and because of his ill health, he stopped going. He also said that he does not know how lawyers work, hence he did not make enquiries from his attorney.

14. Two witnesses testified on behalf of the respondent.

15. Deveraj Naidoo testified that he was the factory manager of the Space Dye Department in which the applicant worked. He had been involved in all but one of the consultation meetings held with the union. The union had agreed to the voluntary retrenchment process and had in fact supplied the respondent with the names of the employees who were volunteering for retrenchment. Mr Padayachee was one of the employees whose names were submitted to the respondent by union shop stewards at a meeting on 18 June 1998 and the respondent accepted such application. Thereafter and at another meeting on 23 June 1998, the union shop stewards said they were withdrawing Padayachee's name form the volunteers because

his family had advised him against taking voluntary severance package. Naidoo said he was extremely unhappy about the withdrawal because it disrupted the consultation process. A lengthy debate about the withdrawal ensued between the respondent's representatives and the union shop stewards but eventually, management agreed to the withdrawal of Padayachee's name from those of the volunteers. The respondent and the union then looked at the selection criteria, which was LIFO subject to the retention of skills. Personnel files of the three supervisors was called for and produced. The shop stewards and management examined them and both teams of representatives were surprised to learn that the applicant had the shortest service when they initially thought that Makhanya would be the one with the shortest service. However, the personnel records indicated that Makhanya's service was longer than that of the applicant by approximately two weeks. The applicant commenced employment with the respondent on 1 June 1986 and Makhanya on 12 May 1986. All three supervisors had the same skills and the applicant was, with the union's agreement, selected as the candidate for compulsory retrenchment on the strict application of LIFO.

16. Naidoo further testified that no individual consultations were held with the applicant because the respondent's obligation and practice, based on previous retrenchment exercises, was to consult with the union only. Further, at the conclusion of the meeting on 23 June, the shop stewards had specifically said that the respondent should not communicate with its members selected for retrenchment: the union would do that.

17. Naidoo also disputed applicant's version that he had told him that he was retrenched on 20 June 1998. According to Naidoo, Henry Van Wyk, the union shop steward in applicant's department, had either on 23 June following the consultation meeting referred to above or a couple of days thereafter, approached him and requested that the applicant be allowed to stop working before 30 June 1998, being the last working day

for employees to be retrenched, in view of his ill-health but provided he was paid for the month of June in full. The respondent agreed to this request.

18. Under cross-examination, Naidoo stated that although the respondent had accepted Padayachee's application for voluntary retrenchment, the union had the right to change its mind and the respondent was willing to accept that change. He conceded that the respondent did not consult with the applicant because in his view, there was no obligation to do so. He said that if the union had not said they should not communicate with employees selected for retrenchment, the respondent would have done so, as it did with employees who were not union members.

19. It was put to Naidoo that he could not vouch for the correctness of Makhanya's date of employment, as he was not the one who had completed the personnel form reflecting his date of employment. Naidoo conceded that he could not do so but pointed out that if the information herein was incorrect, the union would have raised it at the meeting of 23 June 1998 and this was not done.

20. Ms Heidi Brown was the second witness for the respondent.

21. She testified that she was the Human Resources Manager at the time of the retrenchment, although she now was no longer in respondent's employ, having resigned in September 1999. She had attended all the consultation meetings between the respondent and the union. The respondent had consulted with the union because the recognition agreement between them provided that the union bargained on behalf of all employees, and not just its members.

22. Brown disputed applicant's evidence that she had given him his certificate of service on 20 June 1998. She said that she did not work on Saturdays and 20 June 1998 was a Saturday.

23. Under cross-examination, she said that it was Naidoo who had raised reservations about accepting the withdrawal of Padayachee's name from the list of those opting for voluntary retrenchment, that the matter was debated and eventually agreed to. She confirmed that the applicant would not have been retrenched had the respondent refused to consider and accept the union's withdrawal of Padayachee's name from the list of employees who had opted for voluntary retrenchment. She, however, stated that there was nothing wrong in having accepted the withdrawal, as it was part and parcel of the consultation process, which involved discussions and agreement. She also stated that the respondent only consulted with the union and not individual members, that this was both in terms of the agreements with the union and previous practice. Regarding the fact that the letter of retrenchment addressed to the applicant referred to "correspondence and subsequent meetings with you", she conceded that the reference to "you" in the letter could be misleading as such correspondence and meetings were with the union and not the applicant. She stated, however, that the letter was a standard letter sent to all employees who were retrenched.

Submissions

24. Mr Rorick, appearing for the applicant, did not make any submissions regarding the period of delay and the explanation tendered. He concentrated instead, on the alleged unfairness of applicant's dismissal and as such, the prospects of success. He submitted that it was not applicant's case that he should have been consulted with from the commencement of the consultation process. The applicant accepted the collective agreements and collective bargaining arrangements, including those with regard to consultations about possible retrenchments, made by the respondent and the union. What he contended for was that in this case, because the respondent

had called for volunteers and had accepted the names submitted to it on 18 June 1998, including that of Padayachee, once it decided that it would accept the withdrawal of his name from the list, it was obliged in such circumstance, to consult personally with the applicant about the effect of accepting the withdrawal. He submitted that the applicant became entitled to the application of the audi alteram partem rule, as he then became a candidate for retrenchment because of the acceptance of the withdrawal of the name of an employee whose volunteering for retrenchment had meant that the applicant would not be retrenched. The respondent's failure to do so, he submitted, rendered the subsequent dismissal procedurally unfair, entitling the applicant to compensation in terms of section 194(1) of the Act.

25. On behalf of the respondent, Mr Maeso submitted that the delay was excessive, the explanation woeful and with very little prospects for success. In the latter regard, Mr Maeso submitted that the obligation created by section 189(1) was to consult with the appropriate body, in *casu,* the union. Once such consultations commence, the obligation in respect consultations on all matters referred to in the remainder of section 189 of the Act remains is on the same consulting parties. He referred to section 189(5) of the Act, which requires an employer to allow the other consulting party an opportunity to make representations about any matter about which they are consulting. Such matters, he said, include the identity of employees to be retrenched. The respondent had considered the union's representations about the withdrawal of Padayachee's name from the list of volunteers for retrenchment and had thus discharged its obligations in terms of the Act.

Conclusions

26. The referral was late by a period of some seven months and a couple of days. Considering that a prospective litigant is given three months to refer a dispute for adjudication, the period of

delay in this case is substantial. The explanation offered is to say the least, inadequate. The applicant provides two contradictory reasons for the late referral. On the one hand he claims that he did not have money and on the other, he says that he had given his attorney the certificate of outcome and was told that the matter would be referred to the Labour Court. In the latter context, the applicant did not say that his attorney demanded payment and that he could not afford such payment. In fact, his evidence under cross-examination was that having given the certificate of outcome to his attorney, he did nothing, not even an enquiry by phone to his attorney, to find out what was happening to his matter. He waited until June 2002 when he was informed that the matter was set down for trial. For a period of more than twenty months he did nothing to find out what was happening to his matter.

27. After the applicant was cross-examined, there was an opportunity for his attorney to be called to furnish an explanation for the delay, if applicant's version was not correct about why there was a delay. The attorney was not called nor has he furnished any explanation why the referral was late, give that he had been given the certificate of outcome timeously. I must therefore, in the absence of any evidence to the contrary, accept that the delay was due to the negligence of applicant's attorney. This is compounded by the fact that when the referral was eventually made and a statement of case filed, it was not accompanied by an application for condonation. Yet applicant's attorney must have known that the referral was out of time and that condonation was required.

28. This is a case where, in my view, the consequences of the negligence of the attorney must be visited upon the applicant, see *Salojee & Another N.N.O. v Minister of Community De*velopment 1965(2) SA 135 (A), *NUMSA & Others v Duro Pressing (Pty) Limited*, JS741/01(an unreported Labour Court judgment of Ntsebeza AJ, dated 13 August 2002).

29. The applicant may not have known that there is a time limit within which a referral to this court must be made. Such ignorance however, does not justify his failure to make any enquiries about the progress in his matter for a period spanning more than two years, i.e. from 29 November 1999 when he gave the certificate of outcome to his attorney to June 2002 when he received notification about the trial date.

30. I agree with respondent's submission that the explanation tendered for such a long period of delay is woeful.

31. Applicant's prospects of success are not good either.

32. The concession by applicant's counsel that the respondent was not required to consult with the applicant personally about the proposed retrenchments is well-made. In *Sikhosana & Others v Sasol Synthetic Fuels* (2000) 21 ILJ 649(LC), Brassey AJ correctly held that the provisions of section 189(1) of the Act prescribed who the other consulting party should be when retrenchments are contemplated. The party identified is then consulted, to the exclusion of all others. The same conclusion was arrived at by the Labour Appeal Court in *Baloyi v M & P Manufacturing* (2001) 22 ILJ 391(LAC). The court held that an employer's obligation was to consult with the party identified by section 189(1) of the Act and that no separate consultations with an individual employee affected by the retrenchment is required (at 396C-H).

33. The submission that the withdrawal of Padayachee's name from the list of employees who had opted for voluntary retrenchment created an obligation on the respondent to then consult with the applicant is without merit. The process of calling for volunteers was a product of the consultation process in which the respondent and the union were engaged. Indeed, the collective agreement between the union and the respondent required that such a process be considered. The names of volunteers were submitted to the respondent by the union.

34. It is so that the respondent had accepted Padayachee's application for a voluntary retrenchment before the meeting of 23 June 1998 when the union informed the respondent that it wished to withdraw his name from the list. No agreement had by then been concluded between the union and the respondent in this regard. Nothing, however, precluded the union from making the request that it did, nor was the respondent precluded from considering and acceding to the request. The same shop stewards who had submitted Padayachee's name sought its withdrawal. The respondent would have been entitled to refuse to remove Padayachee's name. But as both Mr Naidoo and Ms Brown testified, the process of consultation is about give and take, names are added and removed from lists until a final agreement is reached. The respondent agreed to the removal of Padayachee's name, and it was entitled to do so.

35. In my view, nothing in law or equity precludes an employer who has concluded an agreement with a collective bargaining agent from, following further consultations, agreeing to cancel the agreement. Our law recognizes the termination of an agreement or contract by the mutual consent of the parties thereto, see *Christie: The Law of Contract in South Africa,* 3rd ed*,* Butterworths, 485. In the context of consultations over retrenchments, and particularly in the context of who should be retrenched, it can be expected that proposals and counter-proposals would be made, agreement reached and then changed as names are added, removed or substituted. It is all part of the process of seeking to reach consensus on the matters that in terms of section 189 of the Act, require consultation.

36. Section 189(5) of the Act makes it clear that the employer must allow the other consulting party to make representations over matters about which the parties are consulting. That obligation remains on the other consulting party throughout the process. *In casu*, the union, of which both the applicant and Padayachee

were members, was the other consulting party. The union remained the party with whom the respondent was obliged to consult on matters regarding the retrenchments. One of these matters was the identity of employees to be retrenched. The fact that the identities of the candidates for retrenchment changed as the consultation process unfolded did not create a separate obligation for the respondent to consult with the individuals whose names were being removed or added to the list.

37. In *Baloyi v M & P Manufacturing*, *supra*, the court rejected a submission that because the employer had deviated from the application of LIFO in selecting the appellant for retrenchment by considering past performance, there was an obligation on the employer to consult separately with the appellant to allow him to make representation in regard thereto. In rejecting this submission, the court held that by consulting with the appellant's union, the respondent had discharged its obligations in terms of section 189 of the Act. The applicant's position *in casu* is no different from that of the appellant in Baloyi v M& P Manufacturing, supra. The respondent consulted with SACTWU about the retrenchments. The union requested that Padayachee's withdrawal be accepted. After consultations with the respondent, both parties agreed to the withdrawal and to the application of LIFO to select the employee who would be retrenched as a consequence of the withdrawal. The union agreed to the selection of the applicant as the employee to be retrenched, after satisfying itself that he had the shortest service of the three supervisors from whom the candidate for retrenchment was to be selected. The applicant was then retrenched as a result of agreement between the respondent and the union.

38. The respondent observed the audi alteram partem rule by considering representations from the union. The audi rule in the context of consultation about retrenchments is observed by having such consultations with the appropriate consulting party

as identified using the provisions of section 189(1) of the Act. The respondent complied by consulting with the union. The dismissal of the applicant as a result of applicant's undisputed operational requirements was thus both for a valid reason and in compliance with a fair procedure.

39. It follows that in the light of the long delay, the weak explanation offered and the absence of any prospects of success, the application for condonation must fail.

40. Regarding costs, it was submitted on behalf of the applicant that there should be no order as to costs, regardless of the outcome. On behalf of the respondent, it was submitted that costs should follow the result.

41. I am inclined to agree with the respondent's submission. The applicant acted on legal advice throughout this litigation, including having the benefit of counsel's advice. The decision to proceed with the mater to trial must therefore, have taken into consideration the possibility that the applicant could lose and that the respondent would have incurred legal costs in the process. The applicant was a member of a union, which consulted with the respondent prior to his retrenchment and which is not a party to the litigation. The decision to challenge the dismissal was that of the applicant and I cannot see any reason why, having regard to the requirements of the law and fairness, costs should not follow the result.

42. In the result, I make the following orders:

42.1 the application for condonation is dismissed;

42.2 applicant's referral of his alleged unfair dismissal dispute for adjudication is struck off;

42.3 applicant is to pay respondent's costs.

On behalf of the Applicant: Adv S Rorick, instructed by M.K. James and Associates

On behalf of Third Respondent: Mr MG Maeso of Shepstone & Wiley Attorneys..

Date of hearing: 22 August 2002

Date of judgment: 23 August 2002.

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MASERUMULE AJ