THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

Case Number C419/2007

In the matter between:

FOOD AND ALLIED WORKERS UNION	First Applicant
VERONICA MOGKOSI	Second Applicant
COLEEN-ANNE JOUBERT	Third Applicant
and	
CAPE HOSPITALITY SERVICES (PTY) LTD t/a SAVOY HOTEL	Respondent

Date heard: 19 November 2014; Heads of Argument received 12 May 2015

Delivered: 18 August 2015

JUDGMENT

RABKIN-NAICKER J

[1] On the 19 November 2014, at the end of this trial, the respondent's attorney undertook to obtain instructions as to whether the respondent could arrange for the record to be obtained. This was as a result of a request from the court for the parties to obtain it. He also undertook to inform the court to his instructions. Mr Spamer did not revert and in March 2015 the court itself obtained the record. This was done because of the long history of the matter and the need for the dispute to be resolved as expeditiously as possible. This judgment is therefore drafted with the benefit of the record before me.

[2] The second and third applicants claim that they were unfairly retrenched during March 2007. They served and filed their statement of case on the 21st August 2007 after a certificate of non-resolution of the dispute was issued by the CCMA. There followed an order that default judgment be granted, and a successful recission application of that order. It is not necessary to detail the permutations of the long road to trial which included various skirmishes in respect of filing a pre-trial minute. The dispute eventually came to trial before me on the 17 November 2014, and I refused an application for postponement by the respondent who sought discovery of documents pertaining to employment of the individual applicants subsequent to their dismissal.

Evidence for the Respondent

[3] Mr Williams (Williams), a director of the respondent testified that Cape Hospitality Services (the company) was formed in 2006 and acquired the Savoy in 2007. He confirmed that the company operated and owned the property at the time of the dismissals and that the hotel business was bought in 2007. He employed a general manager, Mr Richard Ndlovu (Ndlovu) who was managing the hotel. Ndlovu had since left his employ after certain misdemeanours on his part. When the company acquired the hotel Williams testified that it was necessary to restructure the business to cut costs. There were about 47 employees at the time it was acquired as a going concern.

[4] Williams confirmed that second applicant was head cook and third applicant was a senior bar lady and waitress at the time. In order to deal with financial challenges

the company had had to obtain a R200,000 overdraft and reduce the staff and general costs of the company. Asked how identification of those to be retrenched was made he stated that: “I think at the time we looked at the costs to company for every employee and also the areas where we felt we don’t have a need for certain extra staff. I recall very vaguely at the time we had about five to six people in, doing the cooking in the kitchen and we felt at the time that we could do with less people in the kitchen and also in the area, for example in the bar. We then utilised the duty manager to open the bar and then the waiters on the floor to collect let us say the beverages from the counter if need be. Apart from that also we had other areas as well, for example in cleaning areas and in the housekeeping where we had to reduce staff, because we reduced staff closely to about ten.”

[5] Williams testified that as far as the kitchen staff were concerned that there had been four people cooking in the kitchen: “I think there was two head cooks and two cooks and some other staff in the kitchen, so we did not see, the need for four people were, I think they were superfluous at the time, so we then felt that what we could do, if we have just, because we have two shifts every day, a morning shift and an afternoon shift, so we came to the conclusion …….if we have a cook in the morning and a cook in the afternoon and someone senior to manage both we should, be fine.” Since the restructuring there had been no head cook or senior cook, just a cook on each shift and someone to manage the kitchen. The third applicant had been identified to be retrenched.

[6] The staff were called together and Williams testified he was at the meeting to explain to them that there was a challenge facing the business and that: “we are going to look at restructuring the business and some people will be affected. I explained to the staff that they will receive letters of retrenchments and we will identify the people who will be affected and we have discussed this in detail with the staff at the time.” He testified that at the meeting, “we discussed it with the staff in detail to explain to them our situation.” Asked by Mr Spamer whether he engaged the staff and ask them their opinion, Williams testified that: “I think the challenge was such that we called the staff together, we explained to them our dilemma. We told them that we don’t have another option unless someone else

has another option. Nobody could provide us with options, but that is the only option we had at the time, so it is not a matter of we, if we had a choice not to retrench people we would not retrench people but we sat with a dilemma, so we discussed it with staff and explained to them what we are facing and explained to them that we have no choice other than, and if anybody have other choice they are welcome to raise with us. Nobody had any other options, but that is all we could do at the time."

[7] Mr Williams confirmed that the employees accepted their statutory severance packages. He explained that an advertisement placed in a local newspaper (which had been annexed to the statement of case) dated April 18 2007 after the retrenchments, was for a chef to manage the kitchen, but those who applied had salaries far exceeding what could be afforded so the hotel never went ahead with the deployment of such a person. He explained this as follows: "..when we went through the restructuring process, as I said earlier we were, we were at the time overstaffed in the kitchen. We then elected or decided that if we are going to reduce the, the two head chefs plus other we might have to look, instead of looking for a manager we might look for someone, a chef, to manage the, to manage the kitchen.." He testified that there was no replacement of the individual applicants.

[8] Williams was asked whether he recalls the individual applicants belonging to FAWU in March 2007. He stated he recalled management having meetings with FAWU because they claimed to be members of the union. He was not sure whether the union represented them. According to him FAWU did not represent the majority of employees at Savoy.

[9] Williams also testified that Cape Hospitality Services is a property company and that another company was established, the South Africa Voy Group, and since 2012 it manages the business but the assets still belong to the respondent. On being asked for clarification from the court as to whether the hotel business was sold to the South Africa Voy Group Williams stated that it had not. He explained that: "…in the hotel industry management companies, they run the businesses.

The assets belong to the company, but the staff, the operation belongs to the management company, but the assets still belong to Cape Hospitality."

[10] Under cross examination, Williams conceded he could not dispute the individual applicants were members of the union. It was put to him that at the time of their dismissals on 16 March 2007 the individual applicants were the only employees to be dismissed. Williams replied that he had given his answer already. He could not recall the date of the general meeting when he had addressed staff but it must have been in March. He did not have a copy of minutes of the meeting. The general manager Ndlovu had meetings with individuals after that. The company did not follow LIFO but looked at cost to company and at where they were overstaffed. Williams then testified that LIFO had also been used regarding some of those retrenched. There were a number of engagements between his manager and the union but he had no documentary proof of this. It was put to him that the employees would testify that the only time he had a meeting with them was in February when he was introduced to them all by the previous owner. He disputed this.

[11] It was put to Williams that the reason third applicant had been chosen for retrenchment was that Ndlovu had propositioned her and she refused to accept the proposal. Williams replied that this was news to him and he did not know if it was true or not. Williams was cross-examined on the issue of LIFO and testified that he identified the individual applicants for retrenchment on the basis of costs to company and overstaffing. It was put to him that while he allegedly retrenched the two applicants based on financial constraints, the company was advertising for a chef in the same department. Williams stated that "All we were trying to do is to look for someone with skills as a chef, who were trained as a chef, with some formal training as a chef, to fulfil functions that we saw at that time was needed. We never filled that position because we could not afford the cost of a person."

[12] Asked why the particular individuals were selected Williams answered that: "The basis was that we restructured our business because the cost to company was exorbitant, so we look at the highest cost to company. No. 2, the number of

people. That was the criteria." He testified that he was not able to employ the applicants again because there were no positions for them. He conceded that in another case two employees had been reinstated and stated fortunately there were positions at the time. It was put to him that the applicants were only earning around R3000 a month when they were retrenched and was he suggesting that the expenses of the business were hinging on their salaries. Williams explained that at the time of the restructuring there were about five people reduced. Over the last 5 years the staff had been reduced to a total of 29 people from a staff complement of 49. It was put to Williams that over and above the two cooks and one supervisor in the kitchen, and two full time waiters and a supervisor, there are other employees working in the restaurant. Williams stated that the hotel has a number of interns who work at the hotel on a three month basis, funded by the Department of Tourism.

[13] Williams restated that they consulted with staff but not with the union because it was not representative at the hotel at the time. Not even a third of the staff in the company at the time were members of the union, according to him.

Evidence for the Applicants

[14] Mr Lekgamane who was a trade union official for FAWU covering Kimberley in March 2007 gave evidence. He read out a letter he had written on the 16 March 2007 to Ndlovu requesting clarity about the employment future of the two individual applicants. He testified that he did this because the two, who he knew were members of FAWU, visited the union office. He stated that the hotel were fully aware of the unions presence at the Savoy at which the union had long secured organisational rights and the hotel was deducting trade union fees for those workers who were members of the union. He referred to the cashbook of the NEC of FAWU for the month of February 2007 which reflected that subscriptions were being paid. He said that the letter of inquiry he wrote was not responded to and no record of any consultations with the individual applicants was ever forwarded to the union.

[15] He testified that the applicants had shown two documents- retrenchment notice forms- when they came to the union office, and had not signed these. They informed him that they had been dismissed with immediate effect. Under cross-examination Lekagamane was asked whether he checked the individual applicants were members when they approached him. He said he did not have to because he knew they were.

[16] The third applicant testified she was dismissed from the hotel on the night of 15th March 2007. Ndlovu called her in and said tomorrow she must not come in to work but just come in for a meeting. The next morning she went to his office and he gave her the retrenchment notice which read in part as follows:

"Dear Colleen

Due to financial and operational constraints of the company, it has become necessary to reduce staff. To this end we regret to inform you that you will be retrenched from 16 of March 2007."

[17] The letter then set out severance, notice pay etc. However she did not sign it because she told him that she could not just sign, "because I needed to work and I had my children to support." She went to the union office and told Mr Lekgamane she received the notice and that she wouldn't sign it because it was not fair. He told her that he would see what he could do and keep in touch with her. She went back to the union offices to see if there was any feedback from the hotel but there was not. The case went to the CCMA and then the labour court.

[18] She testified that she had no knowledge of a consultation with the general staff. She denied having any meeting with management. She was earning R2540.34 a month at the time of her dismissal. She was the head cook and her main job was to oversee the cooking with three cooks working under her. She testified as to how Ndlovu had made a pass at her and when she did not reciprocate he had made her scrub the floor the next day and told her not to cook. It went on in this way and this was three weeks before the retrenchment letter was issued by him.

[19] She testified she currently works in Postmansburg, 285 km from Kimberley and her children are staying in two different family members' households in Kimberley. She want to be re-instated or get her job back. She became a member of FAWU in 1996 when she worked at the hotel for previous owners. She was a member of the union at the time of her dismissal. She was unemployed for 8 months and moved about a lot so and she does not have documents to show what she earned during that time. She currently works as head cook in a pub and grill.

[20] Under cross-examination she testified that she earned on average R3500 a month in her current job. It was put to her that there were two competing versions of what happened when she went into Ndlovu's office i.e. Williams version that there was consultation with her and her own. She stated that Williams wasn't even there. Mr Spamer also put it to her that she ought to have called another employee, Mr Modise who was according to her evidence, the shop steward at the time, and who was in Ndlovu's office at the time she received the form to corroborate her version.

[21] The next witness for the applicants was a Mrs Lenders who is employed at FAWU head office as the bookkeeper in the accounts department. She referred to the document which she described at the NEC Cashbook dated January 2007 i.e. the National Executive Committee account where the money for subscriptions goes in from the companies where members of FAWU are employed. She read the extract "Savoy Hotel with an amount of R2020.74." That amount had been received on 11 January 2007. Under cross-examination, she agreed that the extracts were taken from bank statements. She could not tell from the information how many FAWU members were employed by the Savoy Hotel or which employees were members of the union.

[22] The second applicant testified that on the 15th March 2007 she went to work. On that night Ndlovu told her she must not come to work the next day but come to a meeting: "He was standing at the door of his office and he gave me a paper telling me that the company is retrenching me because the company is not making enough money. As he gave me the paper I told him that I am not going to sign this paper. I must first consult with my union as I am a member of the union." She then

went straight to the union office and told Joe Lekamane what had happened and gave him the retrenchment notice. After that she had communicated by telephone with him and he told her that she should go to the CCMA for the case.

[23] She denied she was ever consulted with in the form of a meeting. The only time she had seen Williams was when he was introduced to the staff. Ndlovu never consulted with her. She had worked in the restaurant since 1997 until 2003 and then worked as a bar lady and waitress until 2007. At the time of her retrenchment, she had more years of service than the other employees who were waitresses or bar ladies. Only she and Joubert were retrenched on 16 March 2007. She testified that she was not working currently. She had only found one contract job since the retrenchment. She would like to be reinstated. Her salary was R2308.84 at the time of her dismissal. She said that while she would not like other employees to lose their jobs, but in terms of the law she should get her job back. She needed the job because for her and her family as her children were suffering. She stated that "if I am not mistaken as from 2001 all of us except management were members of FAWU, even in 2007 we were members of FAWU."

[24] Asked why she thought she had been targeted for retrenchment she testified that she thought it was because of an argument when Ndlovu didn't want her to cash up when she left at night: "I am supposed to know exactly how much did I make for the evening before I leave, I am supposed to write it down and put it in the safe. He didn't want me to cash up or to count the money, he wanted to do it himself." She had overheard Ndlovu saying to Charles Modise that "this one I am going to cut off his knees".

[25] Under cross examination, she testified that she was supposed to cash up with someone else present and both were supposed to sign for the amount but Ndlovu wanted to do it alone. She said she did not remember whether Modise was a shop steward or member of FAWU. She had worked on contract for a year after the retrenchment. Under re-examination she said that Mr Modise was a supervisor. Because she was unemployed except for that year, she had had to leave her accommodation and go to live in a shack.

Evaluation

[26] The respondent's submissions in its heads of argument essentially boil down to the following: There was due consultation with the individual applicants; the respondent no longer manages the hotel and is not in a position to reinstate anybody; the individual applicants have not proved their union membership and there was no reason to consult FAWU because it was not the majority union.

[27] The respondent's evidence and submissions regarding the fact that it doesn't manage the hotel operation any longer, appear to have been directed towards convincing the court that reinstatement of the applicants is not possible. Williams testified that since the business had been bought by the respondent, as a going concern, it had not been sold to any other corporate entity. Further the respondent did not seek to join the managing company as the employer to the proceedings. No witnesses other than the director of the respondent, Williams, were called to give evidence. In these circumstances whether the respondent has a company managing its operations is really neither here nor there.

[28] The absence of the testimony of Ndlovu regarding the alleged individual consultations with the second and third applicants is fatal to respondent's case. Williams was very vague about the general meeting, had no recollection of the date and the applicants disputed that he had raised the issue of retrenchments when he had addressed the staff. In so far as the respondent believes that it only had the duty to consult the union if it represented the majority of the employees in the workplace, it is wrong in law. Section 189(1) of the LRA provides that:

189 Dismissals based on operational requirements

(1) When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult-

(a) any person whom the employer is required to consult in terms of a collective agreement;

(b) if there is no collective agreement that requires consultation-

(i) a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and

(ii) any registered trade union whose members are likely to be affected by the proposed dismissals;

(c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals; or

(d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose."

[29] In addition, the evidence of the union officials which included stop order records as late as January 2007, in respect of the Savoy hotel, reflected that the union had long been recognised as a representative union in the workplace of the employer. Mr Williams was unable to explain why there was no response to the union's queries regarding the retrenchment of their members, the second and third applicant. All in all the evidence of Williams did not impress the court. On his own version he was unable to give direct evidence of a fair retrenchment process.

[30] His explanation regarding the selection criteria applied, which goes to the issue of substantive fairness of the retrenchments, was also contradictary and sketchy as reflected in my summary of his evidence above. The notion that retrenchment of the two employees who earned less than R3000 a month was critical to the operational costs of the company was unconvincing. While other employees were also retrenched at various times, they were not dismissed at the same time as the individual applicants.

[31] I have no hesitation therefore in finding that the retrenchment of the two applicants was both procedurally and substantively unfair. The issue I have to consider is that of remedy. The retrenchments took place in 2007 and Williams denied there were any positions available at the respondent. He testified that full time staff had

dramatically shrunk since 2007 and that interns were used in addition to full-time staff. His evidence in this regard lack detail and corroboration and did not persuade the court that reinstatement and or re-employment were not reasonably practicable. The second and third applicants both seek the primary remedy of reinstatement. One to be with her children in her hometown and the other to be employed again, having only been employed for one year since the retrenchments.

[32] The Constitutional Court has stated in **Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation B & Arbitration & others**[1], that when it comes to the retrospectivity of any award of reinstatement and/or any backpay relating to such an award of reinstatement, the arbitrator or the judge hearing the matter exercises a discretion in terms of s 193(1):

> "The ordinary meaning of the word "reinstate" is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal. As the language of s 193(1)(a) indicates, the extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal."

[33] As to the exercise of the above discretion, the court said that:

> "It is trite law that the power to grant a remedy in s 193 is by its nature discretionary and that the discretion must be exercised judicially by a court that enjoys that unfettered discretion."[2]

[34] Taking into account the lengthy period of time since the retrenchments, the personal circumstances of the individual applicants and their employment history

[1] (2008) 29 ILJ 2507 (CC) at para 36
[2] At para 48

since their dismissal, I am of the view that the primary remedy of reinstatement should be ordered with a limitation as to retrospectivity. I therefore make the following order:

Order

1. The dismissals of the second and third applicants were procedurally and substantively unfair.

2. The second applicant Ms Veronica Mokgosi is hereby reinstated into the employ of the respondent into the same or a similar position as she held at the time of her dismissal with effect from 1 September 2015.

3. The respondent is to pay backpay in an amount equivalent to 4 years' salary to the second applicant, being an amount of R2,308.84 X 48 = R110, 824.32 within 10 calendar days of this order, being the 28 August 2015

4. The third applicant Ms Coleen-Ann Joubert is hereby reinstated into the employ of the respondent into the same or a similar position as she held at the time of her dismissal with effect from 1 September 2015.

5. The respondent is to pay back pay in an amount equivalent to 18 months of her salary to the third, being an amount of 2,540.34 x18 = R45,726.12 within 10 calendar days of this order, being the 28 August 2015.

6. Respondent is to pay the costs.

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H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

For the Applicants: Ponoane Attorneys

For the Respondent: Spamer-Triebel Attorneys