IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No. JS 167/21

In the matter between:

MALAN J.H. **Applicant**

and

RSB (PTY) LTD **Respondent**

Heard: 21 August 2023

Delivered: 13 October 2023

JUDGMENT

BALOYI, AJ

Introduction

[1] The trial in this matter follows the applicant's referral of the unfair dismissal dispute to this Court for adjudication. He is specifically challenging the fairness of his dismissal which is based on operational requirements. The dispute was accordingly referred to conciliation and a certificate of outcome was issued to the effect that it remained unresolved hence it found its way to this Court. The respondent called five witnesses who testified in support of its case whilst the applicant

relied on his own evidence and that of one other witness he called.

[2] The issues in dispute are identified by the parties in the pre-trial minutes. The Court is specifically required to make a determination on the substantive and procedural fairness of the dismissal. Secondly, whether the applicant's acceptance of payments made to him as recorded in the document titled 'final settlement' signed by both parties post his dismissal has the effect of the resolution of all disputes between them. Lastly, whether the applicant is entitled to relief.

Background

[3] The applicant was a factory manager and has been in the employment of the respondent since 2010. The respondent was at all times material to the dispute and had approximately 100 employees in its books. On 6 November 2019 the respondent issued a notice in terms of section 189(3) of the Labour Relations Act[1] (LRA) conveying its intention to embark on a retrenchment process. Fifteen (15) employees were targeted for the retrenchment. A copy of the notice was placed on the notice board and also sent to the trade union, FAWUSA. The applicant was not a member of this trade union. There was no collective agreement between the respondent and the trade union, however, in terms of the number of its members within the workplace, it was informally viewed as a majority union.

[4] Prior to the issuing of section 189(3) notice the applicant was issued with a written warning that was followed by a final written warning. The applicant was not earmarked for retrenchment. After the issuing of the section 189 notice, 8 employees volunteered to be retrenched and their packages were accordingly prepared and paid out. With these volunteers, the respondent did not see it necessary to go further with an exercise of identifying more employees in terms of any selection criteria at its disposal.

[1] Act 66 of 1995, as amended.

[5] The applicant was the last employee to be terminated on the reason that he volunteered to be retrenched. His name was as a result added to the list of volunteers.

The evidence

[6] Mr Craig Pottow, the director of the respondent testified that according to the financial statement for 2019, a loss of R3 million was reported. This inflicted a severe blow on the respondent's business. The applicant was present when the respondent consulted with the accountant on this issue. On 21 November 2019, there was a consultation meeting between the respondent and the trade union. The respondent was represented by Mr Craig Steel, a labour consultant. The consultation led to the compilation of minutes signed by the representatives of the respondent, the trade union members and non-unionised employees.

[7] Two meetings of the factory employees were held to discuss the outcome of the consultation process. According to the report received by Mr Pottow, the applicant was part of these meetings, in one of which he specifically confirmed that he had indeed volunteered to be retrenched. On 4 December 2019, the applicant applied for leave from 17 December 2019 to 10 January 2020. The factory closed in observance of the annual shutdown on 13 December 2019. This was the applicant's last day of work in view of his retrenchment. The applicant did not report for duty nor sign the attendance register for this day. He only came to the workplace to return the company vehicle that was allocated to him for his use, together with the laptop and factory keys.

[8] It has never happened in the previous years that the applicant left his tools of work when he went on leave. He was allowed to have the vehicle for private use. The return of the company assets was consistent with his knowledge that he was retrenched after volunteering. He left without signing an acknowledgement of receipt of his termination letter. He did not even work on 13 December 2019. The applicant left before Mr Pottow's arrival hence he could not get him to sign the termination letter

dated 8 December 2019.

[9] On 18 December 2020 the applicant was informed by Mr Pottow through a WhatsApp message that his tax directive documents were on their way to him. The applicant responded with a question, specifically wanting to know if he was retrenched. Mr Pottow replied by stating that the applicant had actually asked for the retrenchment. The applicant retorted that he had asked to be put on the road as there was a need for a sales representative. The WhatsApp discussion ended on a note that the applicant would visit the office on the 19th of December 2019 for a further discussion in the presence of Mr Craig Steel. There was a telephonic discussion between the applicant and Mr Pottow and the applicant used foul language towards Mr Pottow.

[10] On 19 December 2019, the applicant sent a message stating that he was not going to honour the appointment. Instead, he requested that the retrenchment papers be delivered to him. He was asked if he had an intention to retract his volunteering to the retrenchment and be subjected to disciplinary action specifically for his conduct during the telephone conversation. His final response was that the retrenchment papers should be sent to him through Betty or Wendy.

[11] On 17 January 2020, the applicant referred an unfair dismissal dispute to the CCMA. On 27 January 2020, the applicant signed the settlement agreement with the respondent for the payment of R106 377.66 which was for the December 2019 salary, leave pay and severance pay. Based on the applicant's calculations, it transpired that there was a short payment of about R3 000.00. The respondent corrected the error and paid the said difference.

[12] During cross-examination, it came to record that the applicant in fact approached Mr Pottow on 2 November 2019 asking to be released on mutual separation. The discussions did not go anywhere. A subsequent discussion with the applicant took place on 9 November 2019, it was mainly about the applicant's request to be placed in a sales position and

the request was turned down. Further discussions between Mr Pottow and the applicant ultimately ended up with Mr Pottow accepting the applicant's gesture of volunteering to be retrenched. The applicant's name was not on the initial list of the employees who volunteered to be retrenched. It was only included in the list compiled on 26 November 2019. The union had no authority to consult on behalf of the applicant. The two weeks' notice pay was agreed to with all the affected employees. The applicant was not required to report for duty in the week of 17 December 2019 as he was expected to be on leave.

[13] The respondent reserved a right to discipline the applicant for having insulted Mr Pottow during the telephone conversation. Mr Pottow disagreed with the applicant's proposition that he was merely reprimanding Mr Pottow for swearing at his wife. It is incorrect that the applicant never asked for a mutual separation. He had the opportunity to clarify this on 18 and 19 December 2019 if he had no intention to volunteer.

[14] Craig Steel is an independent Human Resources consultant, he was appointed to assist the respondent and to negotiate on its behalf during the retrenchment process. It came to his attention through Mr Pottow that the applicant volunteered to be retrenched hence he was included in the list. He was supposed to have a meeting with Mr Pottow and the applicant on 19 December 2019. The meeting did proceed, instead, the applicant sent a message indicating that he was not able to attend the meeting. When he sent the message, Mr Steel was already at the workplace. There was no need to go through an extensive consultation, with the applicant since his offer of volunteering to be retrenched was accepted by the respondent.

[15] The applicant was part of the management team and he used to appear on behalf of the respondent in the CCMA disputes. The return of tools of work on 13 December 2019 made him assume that the applicant knew and accepted that he was retrenched. He was unable to confirm the applicant's proposition that the equipment was needed for use in the

workplace in his absence.

[16] Godfrey Modipe and Wilberforce Ntshangase are two factory employees who were part of the consultation meetings on behalf of union members and non-union members respectively. Their evidence is mainly focused on the existence of consultation meetings. Furthermore, it came to their knowledge that the applicant volunteered to be retrenched and that he formed part of the meeting in which his inclusion in the list was confirmed and he did not object to such inclusion. Despite the applicant's denial that he was not part of the meeting, they maintained their position.

[17] Wendy Barnard the respondent's debtors clerk was at the workplace on 13 December 2019, and she knew that it was the applicant's last day. The applicant however did not report for duty on the day. He only came to the workplace to drop his tools of work and hurriedly left without signing the attendance register. He never left the company vehicle each time he went on leave in the past. She maintained that she was the last to leave the workplace on 13 December 2019, not the applicant. She did not see the applicant making fire for the braai.

[18] The applicant, Johannes Hendrick Malan was a factory manager. He was aware of the retrenchment process that was first discussed at the management level. However, he did not volunteer or ask for mutual separation. He was never part of the meetings on the issue. He did ask Mr Pottow to place him in sales, but Mr Pottow did not come back to him. When he applied for leave, he was aware of the annual shutdown. Unlike in previous years, he was not required to work during the shutdown period hence he returned the company's belongings.

[19] He did report for duty on 13 December 2019 and spent the whole day at the workplace. He even made the fire for the braai. He heard for the first time through a WhatsApp message that he was retrenched. The union official who dealt with the matter on behalf of union members was Jerry, not Onkabetse. He left the laptop in the safe for safety reasons. The bakkie was left behind for purposes of small deliveries. He left the keys

at the request of Mr Robin Vrey. He referred an unfair dismissal dispute to the CCMA on 20 January 2020 and applied for condonation for such a late referral. He only signed the settlement agreement on 27 January 2020 in order to receive his monies and payment was made in terms of the settlement agreement. He did not attempt to have the settlement set aside.

[20] He was aware that the issuing of written and final written warnings was a clear indication that any further transgression may result in a dismissal. He conceded that he was part of the consultation meeting that was held on the factory floor but did not participate. The respondent's witnesses told lies because of Mr Pottow's influence on them. He conceded to having used foul language towards Mr Pottow during a telephonic conversation on 18 December 2019 and that he had kept the vehicle during holidays in the past. He sought a transfer to sales because he could not work with Mr Pottow's son. He did not attend the meeting on 19 December 2019 because he 'did not feel like'.

[21] Onkabetse Moagi is a union official. He confirmed that he was not part of the consultation meetings, but his colleague Jerry Motlhabane attended. FAWUSA did not have the authority to represent the applicant as he was not a union member.

Analysis

[22] Does a document signed by the applicant titled 'final settlement' imply that the unfair dismissal dispute was extinguished? According to the respondent it does, whilst the applicant holds a contrary view. It is this Court's view that this issue should not be given comprehensive attention as it does not really affect the jurisdictional pillars of this matter. The document reflects that the respondent was to pay the applicant severance pay, leave pay and outstanding salaries. The duty to effect all these payments is founded on the statute[2]. There was really no need for the parties to enter into an agreement for these payments. In this regard,

[2] See sections 32,37, 38 and 41 of the Basic Conditions of Employment Act 75 of 1997.

the offer and acceptance of these monies do not give rise to a settlement of the unfair dismissal dispute. This preliminary point must accordingly fail.

[23] Turning to the merit of the matter, it is trite that any litigant's case should be established from the pleadings. What is notable from the applicant's statement of case is predominantly the applicant's complaints about the respondent's failure to consult with him in terms of section 189 of the LRA. Only in paragraph 5.2 of the statement of case, it is stated that:

> 'The Respondent failed to furnish any information to the applicant regarding the alleged reason for the retrenchment.'

[24] This appears to be the A-Z, of the applicant's case on a claim for substantive unfairness. In the pre-trial minutes, the applicant does not dispute that there was a need to retrench. He advanced a lack of knowledge regarding the respondent's financial problems. The applicant does not dispute that the respondent experienced financial losses to the tune of R3 million in the previous year. He was part of management meetings which resolved that retrenchment was the most viable option to keep the company afloat. With all these undisputed facts, it is not surprising that the applicant has elected not to put a case to contest the substantive fairness of his dismissal. Even up to the point of trial, the applicant has failed to challenge the respondent on this issue. The applicant's claim in respect of substantive fairness of his dismissal should under these circumstances fail.

[25] Regarding procedural fairness, it appears from both the applicant's pleaded case and oral evidence that the respondent is specifically made to face a case of failure to consult with the applicant. He only knew of his retrenchment on 18 December 2023. In his understanding, a decision to retrench him was made long ago. The material placed before this Court points to the effect that all the retrenched employees had initially volunteered to be retrenched. This by all accounts eliminated extensive consultation and the selection criteria became no issue as pointed out by

Mr Pottow. The only controversy that gave rise to this dispute is the applicant's contention that he never volunteered.

[26] As of 9 November 2019, the applicant was sitting with two written warnings, one of which was final and valid. He had openly stated that he had a fallout with two managers one of whom is Mr Pottow's son. He requested to be moved to another position and nothing materialised out of this request. A disputed mutual separation request was made on 2 November 2019. Subsequent to the issuing of section 189(3) notice on 6 December 2019, by agreement the applicant's name was included in the list of employees who volunteered.

[27] Although the applicant denies volunteering, his conduct is not inconsistent with volunteering. All probabilities point to the fact that he was no longer willing to be a factory manager for the respondent. His first bet was to leave the respondent completely through mutual separation. On realizing that it was not happening at the speed he envisaged, he proposed a move to sales. What is disputable about this is that Mr Pottow gave an outright answer that the sales position was not available. Whilst the applicant avers that Mr Pottow promised to revert and he never did. The cumulative effect of this is that the transfer did not happen and the reason for such is not so material.

[28] Whether the applicant was the first or last to leave the workplace on 13 December 2019 is less significant. What mattered most was that he conducted himself in an unusual manner by firstly not signing the attendance register and handing over all his work tools. This gave the respondent the impression that he understood that it was his last day. His claim that Mr De Vrey directed him to hand over the keys for the duration of his leave period is not backed by evidence. Similarly, a claim that he returned the vehicle because it had to be used for small deliveries and the laptop was for safekeeping purposes is unsupported. This does not form part of the applicant's pleaded case and the respondent cannot be faulted for holding an impression that the applicant clearly understood that it was his last day of work.

[29] Even if the above impression may in some way be incorrect, the applicant had an opportunity to meet and engage with the respondent on 19 December 2019. He decided not to honour the appointment and said that he did not feel like it. His cancellation of the meeting after he used foul language towards his employer cannot be ignored. This demonstrated "I don't care" attitude. It does not come as a surprise that he was raking written warnings. With all of the above established, it is highly improbable that the applicant did not volunteer to be relieved of his duties. That the witnesses were influenced by Mr Pottow to tell lies is simply far-fetched. The Court has already pointed out that his pleaded case is littered with deficiencies. With or without any influence, the applicant's case does not raise a call that may lead to a conclusion that the respondent has failed to prove the fairness of the dismissal. The only conclusion to arrive at is that the applicant's unfair dismissal claim should fail both substantively and procedurally.

[30] The last issue which the applicant has pleaded but not prayed for an order as such, is the respondent's failure to pay his notice pay. The respondent did not dispute this but applied its own interpretation of what a notice pay is made of. The applicant only worked partly in December 2019 due to the annual shutdown and being on leave from the 17th. This does not affect his entitlement to notice pay. In terms of section 37 (1) (c) (i) of the Basic Conditions of Employment Act, the applicant is entitled to four weeks' notice pay in view of having served the respondent for a period of more than a year. Section 37(5) provides that:

> 'Notice of termination of a contract of employment given by an employer must-
>
> (a) not be given during any period of leave to which the employee is entitled in terms of Chapter Three; and
>
> (b) not run concurrently with any period of leave to which the employee is entitled in terms of Chapter Three, except sick leave.'

[31] At the time the applicant's contract of employment was formally terminated on 20 December 2019, he was on leave. It will not be in the interests of justice for this Court not to make an appropriate order on this issue. The respondent was well advised and elected not to abide by the legislative provisions. There is no reason why the respondent should not be ordered to pay the applicant's outstanding notice pay with interest.

[32] Regarding costs, this Court aligns itself with the rule that costs follow the order in labour matters. Each party should under the circumstances pay its costs.

[33] In the premises, the following order is made:

Order

1. The dismissal of the applicant is found to be procedurally and substantively fair.

2. The respondent is ordered to pay the applicant notice pay equivalent to four weeks remuneration with interest calculated at the rate of 10.5% per annum within 14 days of this order.

3. There is no order as to costs.

[redacted]

M Baloyi

Acting Judge of the Labour Court of South Africa

Appearances

For the applicant:	Mr DJ Coetsee for Dirk Coetsee Attorneys
For the respondent:	Adv C Badenhorst
Instructed by:	Helena Strydom Attorneys