IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: P09/14

In the matter between:

CARMEN JONES **First Applicant**

CHARLEEN NORMAN **Second Applicant**

PETRO VAN ZYL **Third Applicant**

and

THE COLD CHAIN (PROPRIETARY) LIMITED **Respondent**

Heard: **29 April 2014**

Delivered: **22 May 2015**

Summary: **When a dispute of fact cannot be resolved on affidavits the matter must be referred to oral evidence.**

JUDGMENT

LALLIE J

Introduction

[1] The applicants launched this application seeking an order declaring the respondent's purported termination of their contracts of employment for the respondent's operational requirements procedurally unfair. They further sought the respondent to reinstate them retrospectively on terms and conditions no less favourable than those which existed on 31 December 2013, the date of the termination of their contracts. In addition, they seek the respondents to be directed to consult within them as envisaged in section 189A of the Labour Relations Act 66 of 1995 ("the LRA"), alternatively, to pay them compensation. The application is opposed by the respondent.

Background facts

[2] In 2013, the respondent took a decision to restructure its business. In August 2013, it made preliminary presentations to its employees on the issue. On 9 September 2013, it issued a notice in terms of section 198 (3) of the Labour Relations Act 66 of 1995 ("the LRA") in which it invited its employees to make representations on issues it intended consulting with them on. It promised to schedule individual meetings for consultations after receiving the proposals from the employees. It further advised employees that individual consultation meetings would be scheduled during the month of October for consultation with affected employees. A group consultation was held in October 2013. On 4 December 2013, the first applicant was issued with a letter terminating her services with effect from the end of that month. The second and third applicants submitted that they were informed of their dismissal on 27 November 2013. All the applicants were dismissed for the respondent's operational requirements. The applicants submitted that the respondent dismissed them as envisaged in section 213 of the LRA in a dismissal exercise governed by section 189A of the same Act. In the application at hand, the applicants are challenging the procedural fairness of the dismissals. In its answering affidavit the respondent raised a point *in limine* to the effect that the applicants launched their application outside the 30 day period prescribed in section 189 A (13) of the LRA. Consequently, the applicants filed an application for condonation.

Condonation

[3] The applicants filed this application 27 days late. Their explanation was that they were dismissed with effect from the end of December 2013. They assumed that the date of their dismissal was 31 December 2013, as it was the last date in respect of which they would be paid. The first applicant received legal advice in January 2014 that the applicants should have referred their dispute to the Labour Court 30 days from the date of the dismissal, which, contrary to their understanding, was 27 November and 4 December 2013, the date on which they were advised of the termination of their contracts of employment.

[4] It is trite that in deciding condonation applications the factors to be taken into account include the extent of the delay, its reasons, prospects of success of the applicant for condonation in the main dispute, prejudice that each party will suffer if condonation is granted or refused as well as the interests of justice. The 27 days' delay is not excessive as it is included in the December holidays. The explanation proffered by the applicants is reasonable as their error determining the dismissal date is understandable. It is not unreasonable for an employee to believe that his or her date of dismissal is the last day on duty or the last day of the payment of his or her remuneration. The applicants have good prospects of success in that they could be successful in the main dispute if the allegation they sought to rely on, that the respondent failed to consult with them before their dismissal is proved. The application for condonation must, in the circumstances, succeed.

Dispute of fact

[5] It is common cause that on 9 September 2013, the respondent issued a notice in terms of section 189 (3) of the LRA inviting its employees to consult with it on the possibility of dismissal owing to its operational requirements. In October 2013, the respondent held group consultations. The first applicant missed the consultation as she was on study leave. The first applicant submitted that she was called by Mr Chrysanthou ("Chrysanthou") on 27 November 2013, who informed her that she was going to be dismissed for the

respondent's operational requirements. She denied having participated in any consultation and submitted that the respondent failed in its duty to consult with her before taking the decision to dismiss her. The respondent conceded that the meeting took place. The parties differ on its purpose and agenda. The respondent submitted that the meeting was an individual consultation between the first respondent and her manager. Its purpose was to further consult with the first applicant individual on alternative positions. She was informed of her dismissal after she had made her unwillingness to consider alternative positions clear.

[6] The second respondent was on sick leave when the October consultation was held. She submitted that on her return from hospital on 27 November 2013, she was told that her position would be redundant and her services were no longer required. The respondent submitted that the meeting the second applicant referred to was in fact a consultation with her manager Mr Van Den Berg ("Van Den Berg") in which she was given reasons for such redundancy. Having expressed the view that she understood the reason for the redundancy of her position, she became emotional and requested an afternoon off and to be excused from attending the group consultation which was scheduled for 28 November 2013. She handed in her keys and never returned to work. The third applicant's gripe was that the respondent told her that her position had become redundant when it in fact was assumed by an alternative employee. The only issue she was consulted on was severance pay which the respondent failed to pay in full.

[7] The respondent submitted that the applicants knew as August 2013 that there would be job losses. The first and third applicants were present in the consultation meetings of the 24 and 31 October 2013 and raised no objection. It denied that the consultation held with the third applicant was defective as she rejected an alternative position and accepted the severance pay she was offered.

[8] I have considered the dispute of fact on the parties' versions. The applicants submitted that it could only be resolved through oral evidence while the respondent argued that it was possible to resolve it with the assistance of the

relevant authorities including the decision in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A). I have considered the arguments forwarded for both approaches. I am however, not convinced that this application can be decided on affidavit as the dispute of fact is material and goes to the heart of the matter on hand. The decision whether the consultations were held has far-reaching effects on both parties as it has an influence on the decision on the procedural fairness of the dismissal which may have financial implications. A correct factual basis for that decision is therefore necessary. The dispute of fact needs to be resolved through oral evidence in order to create that basis as this application cannot be properly decided on affidavit.

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

9.1 The application for condonation of the late filing of this application is granted.

9.2 The matter is referred to oral evidence on the following conditions:

9.3 The founding and replying affidavit will be regarded as the statement of case and the answering affidavit the statement of defence.

9.4 Evidence to be led will be in respect of:

9.4.1 Whether the first and second applicant attended a group consultation in Port Elizabeth on 24 October 2013.

9.4.2 Whether the meeting held on 27 November 2013 between the first applicant and Chrysanthou was an individual consultation.

9.4.3 Whether the meeting held on 27 November 2013 between the second applicant and Van Den Berg was in individual consultation.

9.4.4 Whether the third applicant was consulted on severance pay only.

9.4.5 Costs to be cost in the trial.

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Lallie J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Mr Soldatos of Fluxmans Incorporated

For the Respondent: Mr Snyman of Snyman Attorneys