



IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

CASE NO: P185/12

In the matter between

ABEL GURENDEDE

First Applicant

STANFORD MAROWA

Second Applicant

and

EVALEX LOGISTICS

Respondent

Heard: 11 November 2015, and 22 June 2016,

Delivered: 10 November 2017

Summary: In case of unfair dismissal for operational requirements of the employer the onus to prove the existence of the dismissal rests on the employee. When the onus is not discharged the Labour Court lacks jurisdiction to adjudicate the unfair dismissal dispute.

JUDGMENT

Lallie, J

- [1] The respondent conducted business in the sector of transporting goods. He employed the applicants who are Zimbabwean Nationals as ultra-heavy motor vehicle long distance drivers on fixed term contracts. The first applicant's contract commenced on 1 April 2011 and was due to expire on 1 June 2013. The second applicant joined the respondent on 7 January 2010 but he signed his fixed term contract in June of the same year. It was due to expire in June 2014. The applicants submitted that in February 2012 they received texted messages through their cellular telephones (text messages) from Mr Matayire (Matayire), a director of the respondent, in which he dismissed them because his business was in financial difficulties. Matayire denied dismissing the applicants and submitted that they did not have the necessary documents and their inability to produce them on demand, particularly in government departments and areas like the harbour posed a problem to his business. He was sometimes required to intervene for them to be given access. The first applicant had no valid work permit and the second had no valid Public Drivers Permit (PDP).
- [2] As dismissal was in dispute the applicants had, in terms of section 192 of the Labour Relations Act,¹ to prove its existence. Both applicants submitted that their dismissal and its reason was conveyed to them in text messages through their cellular telephones. Although the applicants had promised to tender the messages as evidence, they were unable to do so as they had both lost their cellular telephones. The first applicant insisted that he was dismissed and denied being given time to obtain a valid work permit. He submitted that at all material times he had a valid work permit. He sought to rely on his work permit which was issued on 5 October 2013 and due to expire on 12 December 2014. He also attempted to rely on a receipt for a temporary residence permit which was issued on 5 November 2010. The first applicant conceded under cross-examination that when he was working for the respondent he did not have a work permit. He also conceded that the temporary residence receipt dated 5 November 2010, clearly states that it is not a work, study, or a business permit.

¹ 66 of 1995 (the LRA)

- [3] The second applicant conceded that in February 2012 he did not have a South African PDP but his Zimbabwean one which is valid in the SADEC Region. He did not tender it as evidence. He obtained a South African PDP in 2012. Matayire insisted that he did not dismiss the applicants but gave them time off to obtain the necessary documents. They left and never returned as they had obtained more lucrative jobs.
- [4] It was argued on behalf of the applicants that based on the decision in *Stellenbosch Farmer's Winery Group Ltd and another v Martell at Cie and others*², the applicant's version should be preferred over the respondent's because it is more probable than the one presented by Matayire which was riddled with contradictions. It was further argued that the applicant's failure to produce the promised dismissal messages should not be used against them as people tend to lose cellular telephones. Notwithstanding the contradictions in the respondent's version, it is common cause that the first applicant did not have a work permit in February 2012. It is further common cause that the second applicant did not have a South African PDP in February 2012. Section 15 of the National Road Act³ the regulations of which were published in 2000, requires drivers transporting goods to have a South African PDP. It is not in dispute that the documents were necessary for the respondent to keep the applicants in its employ. The first applicant's allegation that he had a work permit in 2012 turned out to be false. The second applicant also conceded that he did not have a South African PDP in 2012 and did not tender as evidence the one valid in the SADEC Region he claimed to have had in 2012. When the versions of the parties are assessed against the test in *Stellenbosch Farmers' Winery Group* (supra), they support the conclusion that the respondent's version is more probable. All the common cause evidence supports the respondent's version that there was a need to afford the applicants an opportunity to obtain the necessary documents. Although the respondent's version had contradictions and he failed to recall certain events, his version is not far-fetched. The applicants' allegation that they were dismissed was not proved. I therefore conclude that the applicants failed to

² 2003 (1) SA 11 (SCA)

³ 93 of 1996

discharge the onus of proving their dismissal or that the respondent was responsible for the termination of their employment relationship. The Labour Court therefore lacks the necessary jurisdiction to adjudicate their dispute.

[5] The respondent sought a costs order against the applicants on the basis that it is the successful party. Success on its own does not entitle a party to costs. I have considered the submissions on behalf of the both parties on the question of costs and I am not convinced that fairness, which is amongst the factors to be considered, justifies the costs order. The applicants did not act unreasonably in approaching this Court for relief.

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

Order:

1. The applicants' claim is dismissed for lack of jurisdiction.
2. No order is made as to costs.

Z Lallie

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Unwin of Chris Unwin Attorneys

For the Respondent: Advocate Grobler

Instructed by Kirchmanns Attorneys

LABOUR COURT