Employment law update

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Retrenchments

The employment of the two respondent employees in *Super Group Supply Chain Partners v Dlamini and Another* [2013] 3 BLLR 255 (LAC) was terminated for operational requirements on 30 April 2008. The respondents contended that their dismissals were procedurally and substantively unfair. On 18 August 2010 the Labour Court, per Molahlehi J, held that the dismissals of the respondents were substantively unfair, and he ordered the appellant to reinstate them.

The appellant carries on the business of Fast Moving Consumer Goods (FMCG) and at the time provided warehousing and distribution services to three entities. All resources were allocated to all three entities and were not dedicated to a specific contract. In about January 2008 two of these contracts were cancelled. The loss of these contracts had the effect that the appellant lost about 80% of its business and, consequently, the appellant required only about 100 out of its 700 employees. The appellant accordingly contemplated a restructuring of its operations and on 1 April 2008 it issued a notice of termination of service to employees who were to be retrenched, including the respondents. In terms of this notice, the appellant recorded as follows:

‘The new FMCG structure at Super Park will be much smaller with limited positions. The company considered making use of, amongst others, the LIFO (last in, first out) principle, but in order to ensure that the process is substantively and procedurally fair it was agreed that the filling of the new structure’s positions will be done by “open competition”, ie allowing everybody to have an equal chance to apply and to be considered for the

positions in the new FMCG Super Park structure. In terms of the process all applications were reviewed and shortlisted applicants was [*sic*] invited to attend interviews towards the end of March 2008. Unfortunately your application as part of the open competition process was not successful.'

The appellant further informed the employees that, should it not be able to find alternative employment for them, their services would be terminated by 30 April 2008. In a letter dated 18 April 2008, the appellant informed the respondents that, 'as agreed', their employment was being terminated with effect from 30 April 2008.

As regards the 'open competition process', the appellant's evidence was that the appellant embarked on this process in order to retain the best skills. The respondents were invited to apply for positions, but the appellant had no record that they had in fact done so. As regards consultation with the employees, the appellant's human resources executive testified that consultation sessions were held with certain groups of people and, after these consultations, the appellant issued letters in which it invited the employees to consult with it. As far as he was concerned, the onus was on the individual employees to engage with the appellant. The human resources executive estimated that there was a minimum of two consultation sessions per group, but he was not aware if meetings were also held for night shift employees, which included the respondents. He could not dispute the respondents' version that there was only one 'mass meeting' that lasted five minutes, in which they were informed that the appellant had lost the two contracts and that there would be structural changes within the appellant. The human resources executive also could not comment on the respondents' version that they did not know that they had to consult – he emphasised that it was for the employees to initiate meetings for further consultation.

The first respondent testified, *inter alia*, that he had attended a meeting in January 2008 during which the employees were informed about the loss of the contracts and that there would be restructuring. Thereafter, he was not called to any further meetings. During one of his night shifts, the warehouse manager told him that he had

to apply for his job or any other suitable position, and he subsequently submitted a form to the appellant. He said that he received the letter dated 18 April on 30 April. His letter was one of many in a box that the employees were told to search through for the one bearing their name. He did not know why he was selected for retrenchment. The second respondent's evidence was similar in that he, too, did not know why he was selected for retrenchment.

The Labour Court held that, because s 189A of the Labour Relations Act 66 of 1995 (LRA) applied, it was precluded from determining the procedural fairness of the dismissals. However, the dismissals were held to be substantively unfair because there was no evidence that the selection criteria applied were fair and objective, as required by s 189(7).

On appeal to the Labour Appeal Court (LAC), Tlaletsi JA, with Ndlovu JA and Murphy AJA concurring, confirmed the decision of the Labour Court.

The court emphasised that an employer should not approach the consultation process with a predisposition to a particular solution but should approach the process with a mind open to alternatives that are practical and rational. Importantly, it held that it was not fair for an employer 'to shirk its statutory duty' to consult and create an onus on an employee to ensure that he or she chases the employer to ensure that consultation takes place. In this case, there was no evidence that there was consultation on selection criteria; that the employees knew and understood the selection criteria to be applied; that the criteria were fair and objective; that the respondents were fairly identified for retrenchment; that they did not apply for positions; or that those appointed had better or more appropriate skills.

As regards the remedy of reinstatement, the appellant argued that the respondents' positions no longer existed and, as such, it was impossible for the appellant to reinstate them. The LAC noted, however, that there was no evidence before the court to support this claim. The evidence on record suggested, instead, that the first

respondent's position was taken by another employee even before the retrenchment was finalised; both the first and second respondents had been pickers and had moved up the ranks; the second respondent was multi-skilled and had worked primarily on the contract that was not cancelled; the appellant retained several employees who were junior to the respondents; and the respondents' positions still remained, and may only have changed in title. In the circumstances, the LAC held that the order of reinstatement was correct.

The appeal was accordingly dismissed with costs.

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Union's liability to members for negligence

Food and Allied Workers Union v Ngcobo NO and Another (SCA) (unreported case no 353/12, 28-3-2013) (Ponnan JA and Plasket AJA)

This was an appeal from a judgment of the KwaZulu-Natal High Court in which Swain J, in the matter of *Ngcobo NO and Another v Food and Allied Workers Union* [2012] 10 BLLR 1035 (KZD), ordered the appellant to pay damages in the amount of R 107 232 to each respondent, with interest at the prescribed rate running from 28 August 2004 to date of final payment. The respondents cross-appealed, arguing that the quantum awarded should have been doubled.

Background

At the time the respondents were retrenched by their employer, Nestlé, they were members of the appellant trade union, the Food and Allied Workers Union (FAWU).

Subsequent to their dismissals, FAWU, on behalf of the employees, referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration. An official from FAWU attended the conciliation process set for 18 June 2002, but the matter could not be settled and a certificate of non-resolution was issued. It is trite that,

in terms of the Labour Relations Act 66 of 1995 (LRA), FAWU had 90 days from such time to refer the dispute to the Labour Court for adjudication.

After the conciliation process, the respondents visited the offices of FAWU on numerous occasions inquiring about the progress of their matter and on each occasion were informed that the matter was lodged and pending before the Labour Court. In May 2003 the respondents sought the assistance of a university law clinic, which, having inquired into the respondents' matter, advised them that their dispute had not, to date, been referred to the Labour Court.

It was only in November 2003 that FAWU wrote a letter to the respondents informing them of this fact and further advising that a condonation application needed to be made. In April 2004, having consulted its attorney, FAWU advised the respondents that they had weak prospects of success in their case and two months later advised them that it would not proceed with their matter in the Labour Court.

In response to this, the respondents sought legal advice, and a letter on behalf of the respondents was sent to FAWU demanding that it, within two weeks, bring a condonation application on behalf of the respondents, failing which the respondents would institute a claim for damages against it.

FAWU failed to comply with the demand, resulting in the respondents filing a claim against the union.

The SCA

In the majority judgment, the Supreme Court of Appeal (SCA) noted that the respondents' claim was one based in contract and not delict. It therefore became necessary for the court to establish what contractual obligation, if any, FAWU had failed to discharge.

The SCA held that the contract between the parties was one of mandate. Once FAWU accepted its mandate, which was to take the necessary steps to have the respondents' labour dispute determined in accordance with the LRA, it was obliged to act faithfully, honestly and with care and diligence.

Once this was established, the SCA addressed the contention advanced by FAWU that, being a trade union, 'a less exacting standard' was expected of it as compared to that of an attorney. In dispelling this notion, the SCA approved and followed the dictum in *Mead v Clarke* 1922 EDL 49, which reads:

'Voet (XVll.1.9.) points out that, where a man has expressly or tacitly professed to have business capability, he ought not to have undertaken an affair for which he was not qualified and in which he knew or ought to have known that his own lack of skill would be damaging to the interests of his principal.'

On the merits, the court held, at para 47:

'In our view, the mandate given to FAWU was a relatively simple one – it was to take such steps as were necessary to have the respondents' labour dispute with their employer determined in accordance with the provisions of the LRA. That it could easily have done. FAWU committed breaches of its mandate. It did so, in the first place, by failing to timeously refer the respondents' dispute with Nestlé to the Labour Court and, in the second place, by failing to secure condonation for that failure. In both instances it failed to act honestly or diligently.'

This, according to the court, altered the respondents' unconditional right to have their dispute adjudicated to a right that was subject to the Labour Court first having to grant condonation before their matter could be heard.

In confirming the legal principle that ‘a contracting party cannot liberate himself from a contract by reason of his own breach’, the SCA further rejected the argument that the respondents’ failure to themselves apply for condonation placed a bar on instituting civil action against FAWU.

In deciding the quantum of damages to award, the SCA had to further consider whether or not the respondents would have been successful in their claim at the Labour Court.

The court examined the evidence of a Nestlé employee who was at the time ‘intimately involved in’ the restructuring process. Among the concessions he made were:

• He did not know whether the respondents were consulted as part of the retrenchment process.
• The respondents were not offered vacant positions as alternatives to their dismissals.

On these and other grounds, the SCA upheld the court *a quo’s* findings that the respondents’ dismissals would have been both substantively and procedurally unfair.

In deciding how to quantify the damages, the SCA took various factors into account when determining what was just and equitable for both parties under these circumstances, and confirmed the quantum ordered by the court *a quo*.

Both the appeal and cross-appeal were dismissed, with the appellant ordered to the pay the respondents’ costs.

Note: Unreported cases at date of publication may have subsequently been reported.