REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 315/2011

In the matter between:

CSAAWU obo Dube & others **Applicants**

and

ROBERTSON ABBATOIR **Respondent**

Heard: **16-20 March 2015**

Delivered: **23 March 2015**

Summary: Absolution from the instance – LRA s 187(1)(c) – applicants alleging automatically unfair dismissal – no evidence to sustain claim – absolution from the instance granted.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant is the Commercial, Stevedoring, Agricultural and Allied Workers' Union (CSAAWU). The union has referred a dispute to this court on behalf of 39 of its members who were dismissed by the respondent, Robertson Abattoir, in 2010.

[2] The applicants say that they were dismissed on 30 November 2010 by way of a "dismissal lockout" as contemplated in section 187(1)(c) of the Labour Relations Act.[1] They argue that the dismissal was automatically unfair. (In the alternative, they say that the dismissal was automatically unfair in terms of s 187(1)(d) of the LRA; and in the further alternative, that it was simply substantively and procedurally unfair).

[3] The abattoir agrees that it dismissed the employees. However, it says that the facts are simple: 30 of the employees were dismissed for misconduct in the form of insubordination on 1 December 2010, and another nine were dismissed for misconduct on 23 December 2010. There was no lockout and there can be no talk of an automatically unfair dismissal.

The applicant's case

[4] The applicants' case was initially hard to discern. They were initially represented by other attorneys. Those attorneys filed a pre-trial conference minute in August 2011, having been directed to do so by this Court. It was not helpful. The applicants' current attorneys took over in that same month. They delivered an amended statement of claim on 2 December 2011. In the amended statement of claim, they alleged that they had been locked out on 30 November 2010; and:

> "The respondent's dismissal of the applicants was automatically unfair in terms of section 187(1)(b), alternatively section 187(1)(c), further alternatively section187(1)(d) of the Labour relations act 66 of 1995 ('the LRA').
>
> Alternatively to the above, the respondent's dismissal of the applicants was substantively and procedurally unfair."

[5] The parties held a further pre-trial meeting on 15 August 2013. They filed a pre-trial minute on 16 August 2013. In that minute, they recorded as common cause that "the dismissed applicants were all dismissed on 1 December 2010."

[1] Act 66 of 1995 (the LRA).

[6] This recordal led to further confusion. The abattoir raised a point *in limine* that this court had no jurisdiction over the nine employees who were dismissed on 23 December 2010, as that dispute had not been conciliated.

[7] The interlocutory application was heard on 29 July 2014. In a lengthy debate between the Court and the applicants' lead counsel, Ms *De Vos* SC, she crystallised the applicants' case. She made it clear that they were before this Court on the basis of the dispute that had been referred to the CCMA[2] and unsuccessfully conciliated on behalf of all 39[3] employees, and that their case was based on an alleged dismissal in the form of a "termination lockout" on 30 November 2010. That is why they alleged that it constituted an automatically unfair dismissal in terms of s 187(1)(c); and that is why the court had jurisdiction over all the applicants. She referred to the dismissals on 1 December and 23 December 2010 as "formal dismissals". She argued that those dismissals were a sham; what the union alleges, is that its members were dismissed on 30 November 2010. That is the dispute that was conciliated on 15 February 2011 and that is the dispute that served before this Court.

[8] Based on that argument, the Court handed down judgement in the interlocutory application two days later, on 31 July 2014. It found in favour of the union that the Court did have jurisdiction over all the applicants. It noted:

> "Mr *Loots* [for the abbatoir] argued that, in fact, none of the applicants was dismissed on that date [30 November 2010]. Most of them were dismissed on 1 December and the nine remaining employees on 23 December. But the union does not accept that. Whether the union has a good claim, and if it will be able to show on the evidence that its members were indeed dismissed on 30 November, is not for this Court to decide at this stage. That is what they claim. And if that is their claim, this Court has jurisdiction to hear that claim and all the applicants – including the nine who, according

[2] *Robertson Abbatoir v CSAAWU obo Dube & ors* [2014] ZALCCT 38 paras 17-19.

[33] The union initially purported to represent 42 employees, but it became common cause that two of them are still working for the abbatoir and that another one was not represented by it.

to the abattoir, were only dismissed on 23 December – have *locus standi* before the court.

As Nugent JA pointed out in *Makhanya v University of Zululand*[4]*:*

'When the claimant says that the claim arises from the infringement of the common law right to enforce a contract, then that is the claim, as a fact, and the court must deal with it accordingly. When a claimant says that the claim is to enforce a right that is created by the LRA, then that is the claim that the court has before it, as a fact. When he or she says that the claim is to enforce a right derived from the Constitution, then, as a fact, that is the claim. That the claim might be a bad claim is beside the point.'

In the case before me, the applicants – including the nine workers who, according to the abattoir, were dismissed on 23 December – base their claim on an automatically unfair dismissal that they say took place on 30 November 2010. That the claim might be a bad claim and might not pass muster under section 187(1)(c) of the LRA is beside the point. That claim can only be decided once all the evidence is in and once the parties have placed their arguments before the court. It does not deprive the nine workers from their *locus standi* at this stage."

[9] Following that judgement, the parties sought a further directive from the Court with regard to the onus to begin leading evidence at trial. I issued the following directive on 9 September 2014:

"1. The applicants (CSAAWU) must establish the existence of a dismissal on 30 November 2010 in terms of section 192 of the LRA and thus bears the onus to begin.

2. If the union establishes the existence of a dismissal, the respondent (Robertson Abbatoir) must establish that it is fair.

3. The registrar is directed to set the matter down for hearing for 10 days."

[10] The applicants' counsel confirmed in a practice note filed on 12 March 2015 that the matter had been set down for hearing according to that directive. The applicants thus assumed the duty to begin. Counsel for the applicant did not make an opening statement. They led six witnesses and

[4] 2010 (1) SA 62 (SCA) para 71.

closed their case.[5] At the end of the applicants' case, the respondent asked for absolution from the instance.

[11] The question that arises at this stage, therefore, is whether the applicants have led sufficient evidence upon which this court, applying its mind reasonably to that evidence, could or might find for them in the case that they have presented.

The background facts and the evidence

[12] The individual employees all worked in the respondent's abattoir. They were dissatisfied with their low wages and long hours. They approached CSAAWU. They joined the union between September and November 2010. The union met with management on 19 November 2010. Management gave an undertaking that it would comply with the provisions of the Basic Conditions of Employment Act[6] and the employees' contracts of employment. Management attempted to extract from the union an undertaking that its members would agree to slaughter 850 carcasses per day in return for a weekly bonus. It is disputed whether they reached agreement; with only the applicants' evidence before me, I must accept that they did not.

[13] The abattoir alleged that union members embarked on a go slow. On 23 November 2010 it issued final written warnings to 30 of the applicants. On 25 November 2010 it issued written notices to those 30 employees to attend a disciplinary hearing on 30 November 2010. There is a dispute over which of them received the notices. On 29 November 2010, they were told to come to work at 10:00 (instead of 07:00 as usual) the next morning. There is, according to the applicants' counsel before Court now, a dispute over whether they were pertinently told to attend a disciplinary hearing at 10:00 on 30 November; however, in their amended statement of claim (delivered on 2 December 2011 by their current attorneys of record) they say in clear terms:

[5] Five of the six witnesses testified in Afrikaans. Nevertheless, when I enquired from their counsel whether they would prefer the reasons for this judgment to be in Afrikaans or English, she said that they would refer it to be in English. I drafted the judgment accordingly.

[6] Act 75 of 1997.

> "On Monday 29 November 2010 at approximately 17h00, the respondent's Van Staden told the applicants to report to the main office at the respondent's premises at 10h00 the following day for a disciplinary enquiry."

[14] The applicants say that they nevertheless went to work at 07:00 on 30 November but they were not allowed in and the gates were locked. They contacted the union. The general secretary and assistant general secretary, messrs Trevor Christians and Karel Swart, arrived at the abattoir late in the morning. They had a meeting with the abattoir's main member, Mr De Bod, facilitated by the mayor and a town councillor, that afternoon. An official of the Department of Labour, Mr Martin Davids, was also present. In the course of the meeting, Davids said (according to Christians), "Don't you know that your members have already been dismissed?" or words to that effect. Christians testified that De Bod was visibly taken aback ("hy het geskrik") and that he (De Bod) immediately corrected Davids, saying that they were awaiting the outcome of the disciplinary hearing. The chairperson of the disciplinary hearing conveyed that outcome to De Bod the next day, 1 December 2010. The hearing had taken place *in absentia*. The outcome was that the abattoir issued the 30 employees with notices of dismissal dated 1 December 2010 and dismissing them on notice.

[15] The other nine employees were given subsequent notices to attend a disciplinary hearing on 22 December 2010. They were dismissed on notice on 23 December 2010 for misconduct in the form of being absent from work without leave.

Absolution from the instance: the relevant principles

[16] Ms *Van Huyssteen*, for the applicants, referred to the judgments of this Court dealing with the applicable legal principles in *Mouton v Boy Burger (Edms) Bpk*[7] and *Nombakuse*[8]. In essence, the question is whether there

[7] (2011) 32 *ILJ* 671 (LC).

[8] *Nombakuse v Dept of Transport and Public Works, Western Cape Provincial Govt* (2013) 34 *ILJ* 671 (LC).

is evidence upon which this court, applying its mind reasonably to the evidence, could or might (not should, nor ought to) find for the applicants.

[17] The applicants concede that there is no direct evidence that they were dismissed on 30 November 2010. They rely on an inference. And in *Nombakuse*[9] the court said:

> "In the case of an inference, the court will refuse the application for absolution from the instance unless it is satisfied that no reasonable court could draw the inference for which the applicant contends. The court is not required to weigh up different possible inferences but merely to determine whether one of the reasonable inferences is in favour of the applicant."

Sufficient evidence to establish the applicants' case?

[18] In order to establish that either an automatically unfair dismissal or, simply, an unfair dismissal took place on 30 November 2010, the applicants first have to establish that a dismissal did take place on that day, as clarified by applicants' counsel in the hearing on 29 July 2014, in the judgment of 31 July 2014, and the directive of 9 September 2014.

[19] If a dismissal is established, the question is whether it is automatically unfair. The applicants have abandoned their initial claim in terms of s 187(1)(b). They have also not amended their statement of claim, as they had indicated they intended to do, to include a claim in terms of s 187 read with s 5. What remains is, primarily, a claim in terms of s 187(1)(c); and in the alternative, a claim in terms of s 187(1)(d).

[20] In terms of s 186(1), "dismissal" means that an employer has terminated employment with or without notice; and the relevant parts of s 187 read:

> "(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is —
>
> (a) …
>
> (b) …

[9] *Supra* para 22.

(c) to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee;[10]

(d) that the employee took action, or indicated an intention to take action, against the employer by—

(i) exercising any right conferred by this Act; or

(ii) participating in any proceedings in terms of this Act;".

Were the workers dismissed on 30 November?

[21] The first question that arises is whether it constituted a dismissal if the workers were prevented from entering the premises on 30 November 2015.

[22] The short answer is that it did not. They were paid for the day. They were called to a disciplinary hearing. It was held in their absence. The abbatoir terminated their employment for misconduct, with notice – as contemplated by s 186(1)(a) – on 1 December and 23 December 2010 respectively.

[23] Counsel for the applicants argued that the workers were "locked out" and that that constituted a dismissal, relying on *NUMSA v Abancedisi Labour Services.*[11] But in that case, the employees – employed by a labour broker – were not only excluded from the premises of the client to which they were assigned and replaced with new workers; they were also not reassigned work elsewhere and they were not paid wages thereafter. In the case before me, the abbatoir did appoint temporary workers to keep the line going; but the group of 30 workers were paid notice pay from the date of their actual dismissal on 1 December, and the remaining nine continued to be paid, called to a disciplinary hearing for their failure to attend work, attended that hearing in their capacity as employees on 22 December, and were only dismissed – with notice – on 23 December.

[10] Subsection (c) has been substituted by s 31 of Act 6 of 2014 to read: "a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer". However, the applicants in this case rely on the wording of the section before its substitution.

[1111] (2013) 34 *ILJ* 3075 (SCA).

[24] To this must be added Mr Christians's own evidence that, at the meeting on 30 November, Mr De Bod stated unequivocally that the employees had not been dismissed, but that they had to await the outcome of the disciplinary hearing. That outcome was only conveyed to De Bod on 1 December and to the employees subsequently. They were, quite simply, not dismissed before 1 December and 23 December respectively. Mr Christians, the union's general secretary, conceded as much.

Automatically unfair dismissal in terms of s 187(1)(c)

[25] In any event, if there was a lockout on 30 November, it did not imply a dismissal, much less an automatically unfair dismissal as contemplated by s 187(1)(c). Counsel for the applicants implored me to draw such an inference. But there was no evidence to even lead to such an inference. Not even Mr Christians, the general secretary of the union, so much as alleged that the workers were locked out "to compel the employees to accept a demand in respect of any matter of mutual interest between the employer and employees", as required by the subsection. To use a slaughterhouse analogy, *hy kon eenvoudig nie die kloutjie by die oor bring nie*. Neither did any one of the slaughterhouse five who testified. There was not an iota of evidence that, even if the employees were locked out, that lockout was in order to compel them to accept a demand in respect of a matter of mutual interest. And when the workers were dismissed, it was a final dismissal, thus excluding it from the scope of s 187(1)(c).[12]

[26] The applicants have not led any evidence to bring their claim within the scope of s 187(1)(c). For that reason also, the respondent's application for absolution from the instance must succeed.

Automatically unfair dismissal in terms of s 187(1)(d)

[27] Albeit faintly argued by the applicant's counsel, a claim in terms of s 187(1)(d) remained part of their case. The basis for that claim was not set

[12] Cf *Fry's Metals (Pty) Ltd v NUMSA* [2003] 2 BLLR 140 (LAC); *NUMSA v Fry's Metals (Pty) Ltd* [2005] 3 All SA 318 (SCA).

out in their amended statement of claim, but it was clarified as follows in the pre-trial minute of August 2013:

> "Section 187(1)(d): The dismissed applicants were dismissed because, with effect from 22 November 2012, they exercised their rights conferred by s 5(2)(c)(iv) of the Labour Relations Act, 66 of 1995 –
>
> 1. to refuse to work overtime in the absence of a binding agreement to do so (in accordance with section 10(1)(a) of the BCEA, read with s 10(5) thereof);
> 2. to refuse to work in excess of 10 hours overtime per week (in accordance with section 10(1)(b) of the BCEA); and/or
> 3. to refuse to work in excess of 12 hours on any given day (contrary to section 10(1A) of the BCEA".

[28] Again, there is simply no evidence before the court to support such a claim. Not one of the applicants' witnesses testified that any of these reasons constituted the reason for their alleged dismissal on 30 November 2010, apart from the fact that they failed to establish the existence of a dismissal on that date.

Other unfair dismissal

[29] It may or may not be that the applicants' dismissal for misconduct on 1 December and 23 December respectively was unfair. That remains untested. If it was, they should have referred an unfair dismissal dispute to the CCMA for arbitration. This court has no jurisdiction to hear such a dispute, and the parties have not agreed that the court should hear it, sitting as an arbitrator, in terms of section 158 (2)(b) of the LRA. And in any event, such a dispute does not flow from a dismissal on 30 November 2010.

[30] The individual employees did earn low wages and they did work long hours. Those are not issues for this court to pronounce upon, given the parameters within which the applicants chose to clothe their claim.

Conclusion

[31] The applicants have presented no evidence upon which this court could or should find that they were dismissed on 30 November 2010, much less that it constituted an automatically unfair dismissal in terms of ss 187(1)(c) or 187(1)(d) of the LRA. The respondent's application for absolution from the instance succeeds.

[32] With regard to costs, this court is enjoined to take into account the requirements of both law and fairness in terms of s 162 of the LRA. In terms of the law, costs normally follow the result. If that were the only consideration, it follows that the applicants must pay the respondent's costs. That is also what both parties asked for in the pleadings.

[33] However, I must also take into account the requirements of fairness. Specifically, in terms of section 162(2), I may take into account –

> "(a) whether the matter referred to the Court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and –
>
> (b) the conduct of the parties –
>
> (i) in proceeding with or defending the matter before the Court; and
>
> (ii) during the proceedings before the Court."

[34] In exercising my discretion whether or not to award costs, I have, apart from the fact that the union has been the unsuccessful party, taken into account the following:

34.1 The union chose to refer an unfair dismissal dispute based on an alleged "dismissal lockout" in terms of section 187(1)(c) to this Court, instead of referring an unfair dismissal dispute arising from the dismissals for misconduct on 1 December and 23 December respectively to the CCMA for arbitration.

34.2 The applicants have not led any evidence to support the claim in terms of section 187(1)(c) or s 187(1)(d).

34.3 The applicants' cause of action was originally hard to fathom. That was clarified by their counsel in the hearing of 29 July 2014. In the judgement of 31 July 2014, the applicants were forewarned that the claim in which they chose to persist would be a hard claim to prove[13]. Yet they persisted.

34.4 During the course of the trial, the applicants asked for the matter to stand down a number of times because their witnesses were either not available or not prepared.

34.5 The individual applicants are poorly paid workers in a rural community. Although there is no evidence before the court, I am prepared to accept that most of them are probably still unemployed following their dismissal. They are not well educated. They may well have been badly advised, both by the trade union and, at least initially, by the erstwhile attorneys. It would not be fair to order them to pay the respondent's costs.

34.6 On the other hand, the abattoir has been brought to court in a trial that has already lasted six days based on a chosen cause of action that had very limited prospects of success. It has had to incur significant legal costs. Both parties have seen it fit to incur the costs of two counsel; in the case of the applicants, that of Senior Counsel. It would not be fair to the respondent for it to carry all of those costs in circumstances where the applicants have not even come out of the starting blocks and absolution from the instance has been granted.

34.7 The union has represented its members throughout the litigation. In the interlocutory application heard on 29 July 2014, the abattoir had initially also sought an order for security for costs based on its concern that the union may not be able to pay costs. As Mr *Loots* pointed out when we debated costs in this matter, the union at that stage objected vehemently. Its attorney, Mr Mosikili, stated under oath that CSAAWU is not "a man of straw". SERI also stated in correspondence that the respondent's claim that CSAAWU is a "man

[13] *Robertson Abbatoir v CSAAWU* [2014] ZALCCT 38 paras 16-19 and 25.

of straw" is "without foundation". It has not presented any evidence to the contrary in this hearing.

34.8 There is no longer any relationship between the employer and the union.

[35] Taking all these factors into account, I deem it appropriate according to the requirements of the law and fairness to order the union to pay the abattoir's costs, including the costs of two counsel.

Order

The respondent, Robertson Abbatoir, is granted absolution from the instance.

The applicant, CSAAWU, is ordered to pay the respondent's costs, including the costs of two counsel.

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Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS:	Annemarie de Vos SC (with her Elsa van Huyssteen) Instructed by the Socio-Economic Rights Institute (SERI) (Johannesburg).
RESPONDENT:	Hanri Loots (with him Lourens Ackermann) Instructed by Du Bois, De Vries, De Wet & Kroukam (Robertson) and Bisset Boehmke McBlain (Cape Town).