IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JS 230/15

In the matter between

WILLEM HENDRIK DU PLESSIS **Applicant**

and

AMIC TRADING (PTY) LTD T/A TOYS' R US **Respondent**

Heard: **15-17 May 2017**

Delivered: **23 May 2017**

JUDGMENT

SALOOJEE AJ

Introduction

[1] This is an action in which the applicant seeks an order declaring that he was automatically unfairly dismissed in terms of section 187(1)(g) of the Labour

Relations Act,[1] compensation relating to the dismissal, severance pay, interest on the severance pay and costs.

[2] The respondent applied for the grant of absolution from the instance at the end of the applicant's case.

Evidence

[3] The applicant and one other witness Jennifer Valerie Irving (Irving) gave evidence in support of the applicant's case. Irving was employed by the respondent and dismissed at the same time as the applicant.

[4] The applicant was employed by Redgwoods (Pty) Ltd as its National Risk Manager from 1 February 2010. On 1 December 2012, the respondent purchased the business of Redgwoods (Pty) Ltd and the applicant's employment was transferred to the respondent.

[5] The respondent's head office was based in Modderfontein. The applicant contends that during December 2012, the respondent made a decision to relocate the its head office to Durban. However, this decision was not communicated to employees.

[6] During 3 to 5 September 2013 the respondent convened a meeting of its managers in Durban. Upon his arrival in Durban, the applicant was made to return his company motor vehicle.

[7] On 4 September 2013, Irving who was in Modderfontein logged onto the respondent's server and conducted an unauthorized searched for emails relating to her name.

[1] 66 of 1995 as amended (LRA). Section 187(1)(g) provides:

> "(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—
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> . . .
>
> (g) a transfer, or a reason related to a transfer, contemplated in section 197 or 197A."

[8] She came across a communication between the Human Resources Department and the respondent's directors that contained a strategy for her dismissal as well as for the dismissal of the applicant (the email).

[9] The strategy pertaining to the applicant was that the respondent would relocate its offices to Durban and the applicant would be requested to move to Durban. Upon the applicant refusing to move to Durban, the respondent would commence with retrenchment procedures. The email also contained a proposed amount for the applicant's severance pay.

[10] The email has been the subject of a High Court application and the applicant was interdicted from using this email as evidence in this trial without prior permission from the respondent. Despite the interdict, the applicant made use of the email without any objection from the respondent.

[11] On 5 September 2013, the applicant was informed that the respondent's head office would be relocated to Durban and the applicant was requested to move to Durban to work at the respondent's new head office.

[12] The applicant was hesitant to relocate to Durban, as he was aware of the email. However, the applicant decided to foil the respondent's strategy and agreed to relocate to Durban.

[13] After the meeting the applicant changed his mind and refused to move to Durban. The applicant did not trust the respondent after reading the email.

[14] The respondent then commenced with retrenchment procedures. An independent company was engaged to facilitate the consultations and during these consultations two offers were made to the applicant.

[15] The first offer contained two options, the first option was for the applicant to relocate to Durban at the same salary and the second option was to be

employed as an area manager in Gauteng at a reduced salary. The applicant rejected this offer.

[16] The respondent then made a second offer similar to the first offer but included a contribution of R7 500.00 to the applicant's transportation fees in the event that the applicant relocated to Durban.

[17] The applicant rejected this offer, which led to his dismissal on 7 November 2013.

[18] The applicant was also aggrieved that the respondent changed the terms and conditions of the applicant's employment by requesting the return of the company motor vehicle in exchange for a motor vehicle and fuel allowance.

[19] During cross-examination, the applicant made material concessions that affected the outcome of his case.

[20] The applicant and Irving conceded that during 2013 Irving was tasked with finding other premises in Johannesburg. Also, that the respondent extended its existing lease in Modderfontein premises for a further three years. Upon it becoming uneconomical the respondent looked to relocating to Durban. However, the applicant's mistrust after reading the email could not be overcome.

[21] The applicant also conceded that during August 2013 he accepted the content of a letter setting out the return of the company motor vehicle. The applicant was also aware prior to leaving for the managers meeting in Durban that he would have to return the company motor vehicle and fly back to Johannesburg.

[22] The applicant accepted that in exchange for the return of the company motor vehicle, he was paid a motor vehicle allowance and reimbursed for fuel. As a result, he earned more now than he did before he returned the company motor vehicle.

[23] The applicant did not complain on the change to the terms of his employment and only raised this issue after he was dismissed.

The relevant legal considerations

[24] The requirements relating to a retrenchment pursuant to a transfer of business are set out in *Van der Velde v Business & Design Software (Pty) Ltd & Another*[2] where this Court held:

> "In summary, and in an attempt to crystallise these views and to formulate a test that properly balances employer and worker interests, the legal position when an applicant claims that a dismissal is automatically unfair because the reason for dismissal was a transfer in terms of section 197 or a reason related to it, is this:
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> - the applicant must prove the existence of a dismissal and establish that the underlying transaction is one that falls within the ambit of section 197;
> - the applicant must adduce some credible evidence that shows that the dismissal is causally connected to the transfer. This is an objective enquiry, to be conducted by reference to all of the relevant facts and circumstances. The proximity of the dismissal to the date of the transfer is a relevant but not determinative factor in this preliminary enquiry;
> - if the applicant succeeds in discharging these evidentiary burdens, the employer must establish the true reason for dismissal, being a reason that is not automatically unfair;
> - when the employer relies on a fair reason related to its operational requirements (or indeed any other potentially fair reason) as the true reason for dismissal, the Court must apply the two-stage test of factual and

[2] (2006) 27 ILJ 1738 (LC) at 1748-9; [2006] 10 BLLR 1004 (LC) at 1014-5.

legal causation to determine whether the true reason for dismissal was the transfer itself, or a reason related to the employer's operational requirements;

- the test for factual causation is a "but for" test – would the dismissal have taken place but for the transfer?
- if the test for factual causation is satisfied, the test for legal causation must be applied. Here, the Court must determine whether the transfer is the main, dominant, proximate or most likely cause of the dismissal. This is an objective enquiry. The employer's motive for the dismissal and how long before or after the transfer the employee was dismissed, are relevant but not determinative factors.
- if the reason for dismissal was not the transfer itself (because, for example, it was a dismissal effected in anticipation of a transfer and in response to the requirements of a potential purchaser of the business) the true reason may nonetheless be a reason related to the transfer;
- to answer this question (whether the reason was related to the transfer) the Court must determine whether the dismissal was used by the employer as a means to avoid its obligations under section 197. (This is an objective test, which requires the Court to evaluate any evidence adduced by the employer that the true reason for dismissal is one related to its operational requirements, and where the employer's motive for the dismissal is only one of the factors that must be considered).
- if in this sense the employer used the dismissal to avoid it section 197 obligations, then the dismissal was related to the transfer; and
- if not, the reason for dismissal relates to the employer's operational requirements, and the Court must apply

> section 188 read with section 189 of the LRA to determine the fairness of the dismissal."

[25] The Labour Appeal Court in *Commercial Stevedoring Agricultural and Allied Workers Union (CSAAWU) obo Dube and others v Robertson Abattoir*[3] stated the test for absolution from the instance relating to a dismissal:

> "[16] It is important to bear in mind that this appeal is based on a grant of an order of absolution from the instance. Accordingly, the test which must be determined is whether firstly there was a dismissal and secondly whether the appellant has provided evidence which raises a credible possibility that the dismissal in question fell within the scope of section 187(1)(c) of the LRA. This approach has been confirmed by this Court in *Kroukamp v SA Airlink* (*Pty*) *Ltd* [2005] 12 BLLR 1172 (LAC) at par. 28
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> > "In my view s187 imposes an evidential burden upon the employees to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove to the contrary, that is to produce evidence to show that the reason for the dismissal did not fall within the circumstance envisaged in s187 for constituting an automatically unfair dismissal."
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> [17] This *dictum*, which sets out the law insofar as unfair dismissals are concerned, should be read together with the general legal position relating to an application for absolution from the instance at the end of the plaintiff's case. In this connection, the correct approach was set out by Harms JA in *Gordon Lloyd Page and Associates v Rivera and Another*[4] as follows:
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> "The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G–H in these terms:

[3] [2016] 12 BLLR 1163 (LAC) at para 16-17.

[4] 2001 (1) SA 88 (SCA).

> '. . . [W]hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD at 173*; Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307(T).'

This implies that a plaintiff has to make out a prima facie case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no Court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van de Schyff* 1972 (1) SA 26 (A) at 37G–38A; Schmidt Bewysreg 4th ed at 91-2). The test has from time to time formulated in different terms, especially it has been said that the Court must consider whether there is 'evidence upon which a reasonable man might find for the plaintiff' (Cascoyne (loc cit)) – a test which had its origin in jury trials when the 'reasonable man' was a reasonable member of the jury (*Ruto Flour Mills*). Such a formulation tends to cloud the issue. The Court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or Court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a Court should order it in the interest of justice."[5]

This appeal must be determined on the basis of this clear statement of the law as to when it is legally appropriate to grant an order of absolution."

Analysis

[26] The applicant relies on section 187(1)(g) of the LRA, that the reason for his dismissal is automatically unfair as it relates to a transfer or a reason related to a transfer in terms of section 197 of the LRA.

[5] Id at para 2.

[27] As the dismissal is common cause, the applicant is required to discharge the evidentiary burden on an objective basis that the dismissal related to the transfer.

[28] The principal complaints are that the respondent made a decision in December 2012 to relocate its heads office to Durban, that the respondent unilaterally changed the terms of the applicant's employment contract and that the severance package was incorrectly calculated.

[29] Firstly, the applicant's version that the respondent made a decision to relocate the head office in December 2012 is improbable. During 2013, Irving was tasked with finding other premises in Johannesburg, which she actively carried out. However, the respondent extended its Modderfontein lease for a further of three years. It is only upon becoming uneconomical to perform in terms of the lease, that the respondent made the decision to move to Durban.

[30] The respondent would not have sought alternate premises or extended its lease if it made a decision in December 2012 to relocate to Durban.

[31] Secondly, the applicant was informed of the return of the motor vehicle during August 2013. The applicant accepted these changes as he earned a better salary and only complained after his dismissal.

[32] Thirdly, the applicant's severance pay claim is for the difference between the proposed amount contained in the email and the actual amount paid to the applicant.

[33] The email was not a representation of the applicant's severance package. The email contained a projected settlement amount that was intended for discussion between the Human Resources Department and the respondent's directors.

[34] Thus, there is no evidence that the applicant's dismissal is related to the transfer of the business.

[35] During the hearing, the applicant presented evidence related to a dismissal based on operational requirements. The applicant's complaint is that the email determined his fate and he was reluctant to relocate to Durban.

[36] The strategy contained in the email was rendered useless upon the applicant accepting that he would move to Durban. The respondent's conduct thereafter demonstrates that the strategy in the email was not carried through.

[37] Instead, the respondent called on the services of an independent consultant to facilitate consultations. Importantly, the respondent made two reasonable offers in writing to the applicant, which the applicant rejected. The applicant's evidence that he required a written offer from the respondent is untenable in light of two written offers from the respondent.

[38] The evidence demonstrates that the email did not determine the applicant's fate as the respondent's subsequent conduct in holding consultations and making two reasonable written offers to the applicant does not accord with the strategy contained in the email. Thus, the applicant has not demonstrated that the respondent contravened the provisions of sections 188 or 189 of the LRA.

[39] Lastly, I cannot ignore the applicant's submission in opposing absolution from the instance that there was a breakdown of the trust relationship. This submission justifies the applicant's dismissal.

Conclusion

[40] The applicant has not placed evidence that is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. The evidence cannot justify an order upon which this Court applying its mind reasonably to the evidence could or might find for the applicant. Thus, it is in the interests of justice to grant absolution from the instance.

Costs

[41] Section 162 of the LRA empowers this Court with a discretion to award costs in accordance with the requirements of the law and fairness.[6] The Appellate Division in *National Union of Mine Workers v East Rand Gold and Uranium Company Ltd*[7] enunciated the following approach when considering the requirements of law and fairness in regard to costs:

> "1. The provision that "the requirements of the law and fairness" are to be taken into account is consistent with the role of the industrial court as one in which both law and fairness are to be applied.
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> 2. The general rule of our law that in the absence of special circumstances costs follow the event is a relevant consideration. *However, it will yield where considerations of fairness require it.*
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> 3. Proceedings in the industrial court may not infrequently be a part of the conciliation process. That is a role which is designedly given to it. Parties, and particularly individual employees, should not be discouraged from approaching the industrial court in such circumstances. Orders for costs may have such a result and consideration should be given to

[6] Section 162 provides:

> "(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.
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> (2) When deciding whether or not to order the payment of costs, the Labour Court may take into account—
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> (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
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> (b) the conduct of the parties—
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> (i) in proceeding with or defending the matter before the Court; and
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> (ii) during the proceedings before the Court.
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> (3) The Labour Court may order costs against a party to the dispute or against any person who represented that party in those proceedings before the Court.

[7] [1991] ZASCA 168; 1992 (1) SA 700 (A). This approach has been endorsed by this Court in several decisions see for example *Callguard Security Services (Pty) Limited v TGWU & Others* [1997] 4 BLLR 392 (LC) at 399-402; *South African Airways Technical (SOC) Ltd v South African Transport and Allied Workers Union and Another* [2014] 5 BLLR 491 (LC) at para 22.

avoiding it especially where there is a genuine dispute and the approach to the court was not unreasonable. With regard to unfair labour practices, the following passage from the judgment in the *Chamber of Mines* case (supra) at 77G-I commends itself to me:

> "In this regard public policy demands that the industrial court takes into account considerations such as the fact that justice may be denied to parties (especially individual applicant employees) who cannot afford to run the risk of having to pay the other side's costs. The industrial court should be easily accessible to litigants who suffer the effects of unfair labour practices, after all, every man or woman has the right to bring his or her complaints or alleged wrongs before the court and should not be penalized unnecessarily even if the litigant is misguided in bringing his or her application for relief, provided the litigant is bona fide ..."

4. Frequently the parties before the industrial court will have an on-going relationship that will survive after the dispute has been resolved by the court. A costs order, especially where the dispute has been a bona fide one, may damage that relationship and thereby detrimentally effect industrial peace and the conciliation process.

5. The conduct of the respective parties is obviously relevant especially when considerations of fairness are concerned." (Emphasis added.)

In summary, the requirement of law is that costs follow the result, however this ordinary rule is not determinative in awarding costs – it is but a factor to be taken into account.[8] A further consideration is that of fairness and factors relating to this requirement include *inter alia* conduct of the parties; the presence of an ongoing relationship that will survive after the dispute has been resolved by the court – if there is, a costs order may damage such ongoing relationship; was there any mala fides, unreasonableness and

[8] *Wallis v Thorpe and another* (2010) 31 ILJ 1254 (LC) at para 16.

frivolousness – if there was they would constitute factors justifying the imposition of a costs order.[9]

[42] In this case, the applicant presented special circumstances based on his impoverished circumstances. The applicant relies on his spouse for financial assistance and is unable to pay an email subscription to sustain his business. He also relied on the assistance of a labour consultant in the conduct of the trial as he could not afford the services of an attorney or Counsel. This is sufficient to depart from an order for the applicant to pay costs. Fairness, in these circumstances, requires that the general rule that costs follow the event must yield.

Order

[43] In the premise, I make the following order:

1. The application for absolution from the instance is granted.

2. There is no order as to costs.

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Y.F. Saloojee

Acting Judge of the Labour Court of South Africa

[9] *South African Airways Technical (SOC) Ltd v South African Transport and Allied Workers Union and Another* [2014] 5 BLLR 491 (LC) at para 21.

Appearances

For the Applicant:	In person
Heads of argument drafted by:	Adv. R Grundlineh
Instructed by:	Nothnagel Attorneys