IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

DATE: 4 December 2014
CASE NO:19463/2012

In the matter between:

P J VILJOEN Plaintiff/Respondent

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED ✓

4/12/2014 Judge HJ de Vos
DATE SIGNATURE

and

SCHUMANN VD HEEVER & SLABBERT ATTORNEYS Defendant/applicant

JUDGMENT APPLICATION FOR LEAVE TO APPEAL

MURPHY, J

1. The applicant (defendant), a firm of attorneys, applies for leave to appeal against my judgment handed down on 30 July 2014 in which I held it was liable to the respondent/plaintiff for damages arising out of breach of mandate by negligently failing to refer and pursue an unfair dismissal dispute in terms of

the Labour Relations Act of 1995 ("the LRA") in accordance with the instructions of the respondent.

2. The grounds of appeal in the applicant's notice reflect some measure of misunderstanding on the part of the applicant about the nature and scope of my findings. It is best therefore, in the interests of justice between the parties, to deal with them fully.

3. The first ground advanced by the applicant is that I fell into error in that the applicant did not prove and I did not determine the terms of the respondent's employment contract and whether or not a dismissal had occurred. The facts establish beyond any shadow of a doubt that the respondent was employed by his erstwhile employer ("BP") and that it terminated his employment on 31 March 2008. Indeed, such would appear to be common cause. His terms of contract (besides the issue of retirement age) were not in issue. They had no direct bearing on whether he had a claim for unfair dismissal under the LRA. The term dismissal is defined in section 186(a) of the LRA to mean "an employer has terminated a contract of employment with or without notice". That is what happened here. The respondent's contract was terminated with notice. Had the matter been referred to the Labour Court by the applicant the principal issue for determination would have been the fairness of the dismissal, and not whether there was in fact a dismissal. The suggestion that because the respondent worked past his agreed retirement age he did not have a contract of employment is unsustainable in principle. It is common cause that he rendered services and received remuneration for about one year after he

reached the age of 60. For that year he remained in employment and thus his contract of employment subsisted until it was terminated when he was dismissed as contemplated by the LRA. Hence, there is no merit at all in the first ground of appeal.

4. The second ground of appeal is that I erred in finding that the respondent's dismissal was unfair on the grounds that there remained an alternative available post for which the respondent was qualified or could have been up-skilled, particularly because there was no evidence led whether the post could be adapted or the respondent up-skilled. The ground misstates my actual finding.

5. In order to succeed in his claim for breach of mandate the plaintiff was required to prove the mandate and its terms, a breach of the mandate, usually in the form of a negligent failure on the part of the attorney to exercise the skill, adequate knowledge and diligence expected of a legal practitioner, a reasonable likelihood of success in the proceedings to have been instituted and damages within the contemplation of the parties when the mandate was concluded. My finding is to the effect that the evidence given by the respondent was sufficient to establish that he had a reasonable likelihood of success in an unfair dismissal suit. It was not incumbent upon the respondent to establish conclusively that the dismissal was unfair. It was sufficient for him to show a reasonable likelihood of success, which naturally involves some consideration of whether the dismissal was in fact fair. In his evidence (which was effectively unchallenged on this aspect) the respondent established that a

post which was in most respects identical to the one he had occupied remained vacant after his retrenchment and he challenged the proposition that he lacked the competency to handle the so-called "bestuurs-komponent" attached to it. He was sceptical that the so-called "bestuurs-komponent" was in fact a genuine requirement or that his dismissal was justified by operational requirements. The evidence does not reveal the nature and extent of the "bestuurs-komponent" nor the nature of the deficiency on the part of the respondent in meeting it. The existence of a virtually identical vacant post in and of itself gives rise to the reasonable inference that the employer did not properly consider alternatives, was in breach of its duty to mitigate the adverse effects of a dismissal and did not dismiss as a last resort. The available evidence accordingly reached the applicable threshold requirement of demonstrating "a reasonable likelihood of success" in an unfair dismissal suit. As the other elements of a breach of mandate had been established or were common cause, the respondent met the onus upon him to prove a breach of mandate. There is accordingly no merit in the second ground of appeal either.

6. The third ground of appeal is that I erred in finding that the onus of proof regarding non-compliance with section 189 of the LRA did not rest with the respondent and that there is merit in the submission that the applicant stepped into the shoes of the employer – paragraph 3.1 of the application for leave to appeal. The stated ground fails to recognise that my observations in that regard, in paragraph 23 of the judgment, were in fact *obiter*. It is clear from paragraph 24 of the judgment that my decision is predicated upon a finding that if the onus was indeed on the plaintiff to establish the unfairness of the dismissal, he had in fact discharged it. Accordingly, the grounds of appeal set out in paragraphs 3.1 and 3.2 (my supposed failure to find that the

defendant bore no onus to prove unfairness) of the application for leave to appeal are unsustainable.

7. In paragraph 3.3 of the application for leave to appeal it is alleged that I failed to give due consideration and weight to certain concessions made by the plaintiff to the effect that BP had in fact followed a fair process in retrenching him and had acted lawfully. My judgment is clear and unambiguous in its finding in favour of the applicant/defendant that no case for wrongful termination was proved by the respondent. The concession by the plaintiff of lawfulness was well-made, albeit perhaps unwittingly so. The concessions in relation to procedural fairness were also neither here nor there. The respondent established that he had a reasonable likelihood of proving substantive unfairness on the grounds that his dismissal was neither one of last resort or necessary, and also because the employer did not take reasonable steps to mitigate the adverse effects of dismissal. There is accordingly no merit in these grounds either.

8. The ground in paragraph 3.4 of the application for leave to appeal is unclear. It alleges that I erred "by not giving due consideration, alternatively due weight to the Plaintiff's admission that he does not know what the contract between and BP (*sic*) was". The *essentialia* of the contract are beyond dispute. The respondent worked as an Accounts Manager for BP for which he received monthly remuneration and benefits. Whether or not there were other terms, and his disputed retirement age, were not strictly relevant to the determination of the fairness of the termination of his contract, especially in

light of the respondent's concession that age was not a consideration and that he was dismissed for operational requirement reasons – see paragraph 17 of the judgment. This ground too accordingly does not support granting leave to appeal.

9. Paragraph 3.5.1 of the application alleges that I did not give due consideration or weight to the plaintiff's concession that it was not true that "no proposals were made and/or considered by BP pertaining to retrenchment". Again nothing turns on the concession. The failure to entertain proposals would normally lead to a claim of procedural unfairness and possibly substantive unfairness in that it would lead to an ill-informed pre-judgement about the necessity for dismissal. The respondent's reasonable likelihood of success rested upon something else, namely substantive unfairness in the form of an unnecessary dismissal, despite consideration of alternative proposals. Likewise, his concession that the selection criteria were fair and fairly applied (see paragraph 3.5.2 and 3.5.3 of the application) is equally inconsequential. He proved another species of substantive unfairness. These alleged grounds hence furnish no basis for granting leave to appeal.

10. In paragraph 3.6.1 the applicant contends that I erred by finding that the respondent was not counselled or supported in attaining the required competency standard for the vacant post. But that is the unchallenged evidence.

11. In paragraph 3.6.3 the applicant alleges that I erred in finding that "a legitimate suspicion arises" that other non-disclosed reasons for dismissal existed, which casted some doubt upon the application of the selection criteria. These observations are *obiter*, but nonetheless justified in light of the common cause fact that a somewhat fractious, on-going, unresolved dispute existed between the respondent and BP regarding his terms and conditions of employment. The inference (at the level of suspicion) is consistent with the proven facts and is a reasonable one in the circumstances of this particular dismissal, especially the fact that a post with similar responsibilities to those he had undertaken in the past remained vacant at the respondent's place of employment after his dismissal.

12. It is alleged in paragraph 3.6.4 that I erred in finding that the damages suffered by the plaintiff were in the contemplation of the attorney as this aspect was not pleaded and no evidence was led in relation to it. Any competent attorney would know that a failure to refer a claim in terms of the LRA would result in harm in the form of a loss of the benefit of the available statutory remedies. No evidence is required in that regard. It is inconceivable that an attorney could expect to adduce evidence that he did not contemplate harm arising out of his incompetence in the present circumstances. The opportunity to take issue regarding the quantum of the foreseeable damages can still be pursued in the separated damages hearing.

13. The grounds of appeal alleged in paragraph 3.7 of the application repeat some of the grounds in relation to the onus and evidentiary burden, which I have dealt with above and are unsustainable for the same reasons.

14. The ground alleged in paragraph 3.8.1 reflects in my opinion a measure of conceptual confusion on the part of the applicant. It is there alleged that I erred by not finding that "the plaintiff has not pleaded a case nor proved that, assuming his employment contract only entitled him to work until the age of 60, the termination of his employment was nonetheless unfair." The ground seems to hold out the hope that a court will find that it will never be unfair to dismiss an employee who continues to work for his employer after the agreed retirement age. The existence of an agreed retirement age means that an employer cannot compel an employer to retire before that age. Should the employee continue to render services and receive remuneration there has been either a continuation of the contract, a tacit relocation, or perhaps the constituting of a new contract, re-employment. The termination of that relocated or new contract will constitute a dismissal in terms of section 186 of the LRA. In determining whether termination was fair or not, the court may legitimately take account of the fact that an employee has passed retirement age. But that is not a consideration in this case because with the concession by the respondent that he was not dismissed on age grounds it is common cause that the applicant did not take that fact into account when it dismissed the applicant on operational requirement grounds. So there is wholly no merit in this ground either.

15. The other grounds of appeal relate to the issues related to the renunciation of the mandate and the question of costs dealt with in paragraphs 42 and 43 of the judgment. I am not persuaded that another court will come to a different conclusion on those issues for the reasons set out there.

16. In the result, the applicant has not made out a case that a reasonable prospect exists that another court will come to a different conclusion.

17. I accordingly make the following order:

> "The application for leave to appeal is dismissed with costs including the costs of two counsel".

JR MURPHY

JUDGE OF THE NORTH GAUTENG HIGH COURT

Heard on:	5 November 2014
For the:	Adv TP Krüger
	Adv C D'Alton
Instructed by:	Bares & Basson Attorneys
For the:	Adv NS Krüger
Instructed by:	Savage Jooste & Adams Attorneys