IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NUMBER : J 1648 / 99

In the matter between:

Applicant

and

Respondent

JUDGMENT

LANDMAN J:

1.Henry Basson, who had worked for other companies in the group, took up employment with Cecil Nurse (Pty) Ltd in December 1998 as a projects manager in its Bidoffice Corporate Furniture Division. His primary task was to sell office furniture in the corporate market. On 18 March 1999 the Managing Director, Mr Dave Mitchell, called him into his office and informed him that he was being retrenched. The 18th of March was to be his last working day but he would be paid until the end of April.

2.Mr Basson was distressed and sought legal advice. His legal advisor wrote to Cecil Nurse and the parties agreed to meet on 12 April 1999. At this meeting Cecil Nurse conceded that it had not dismissed Mr Basson fairly. It had not complied with the provisions of s 189 of the Labour Relations Act 66 of 1995. Cecil Nurse offered to

reinstate Mr Basson retrospectively to the date of his dismissal so that it could rectify the matter.

3.Mr Basson was prepared to accept reinstatement provided Cecil Nurse committed itself to retaining him for a period of 6 months and paying him a severance package of a minimum of six months' remuneration should he be retrenched in the future.

4.Cecil Nurse's offer was repeated in a letter addressed by its attorneys to Mr Basson's legal advisor. On 19 April the offer was again rejected. It was declined in the following terms:

"For the record we wish to state that reinstatement without the consideration or offer of compensation consequent upon your client's acts of willful wrongdoing is not an adequate remedy to redress your client's past wrongs. In the circumstances we have been instructed to advise to reject your proposal aforesaid for reasons that will be more fully dealt with in the appropriate forum."

5.The dispute was processed through the legal system and culminated in a trial before me. Only Mr Mitchell gave evidence. Mr Basson's counsel closed his case without leading evidence.

6.At the end of the trial on 28 November 2000 matters stood as follows:

(a) Cecil Nurse admitted that the dismissal of Mr Basson was unfair.

(b) A tender of reinstatement had been made and had been rejected.

(c) Mr Basson sought compensation for his unfair dismissal equivalent to his remuneration for a period of

24 months which was reduced to 12 months. He does not seek reinstatement.

7.The issue are very simple: Is Mr Basson entitled to compensation for procedural unfairness given the tender of reinstatement to remedy the defective dismissal? Put differently ought this court to exercise a discretion against awarding him compensation for this in the circumstances where it its incumbent on the court to make no award or order Cecil Nurse to pay compensation in the amount of R 169 200? Secondly what compensation for substantive unfairness should be made (even if in the upshot a single amount is awarded)?

8.Mr Myburgh, on behalf of Cecil Nurse, submitted that in view of his client's bona fide offer of reinstatement to redress the situation, Mr Basson should not be awarded compensation but that the claim should be dismissed with a punitive order for costs.

9.At first the Industrial Court declined to take cognisance of a tender of reinstatement coupled with the intention of following a proper procedure. See *MAWU v Henred Freuhauf Trailers* (1988) 9 *ILJ* 488 (IC), and *Van Dyk v Markly Investments* (1998) 9 *ILJ* 918 (LC). In the last mentioned decision Bulbulia M (as he then was) did not approve of such a tender. He said at 921H-I:

"It was probably no more than an attempt to get the applicant to attend a fresh enquiry so as to afford the respondent an opportunity to set right any procedural irregularities which may have occurred during the first enquiry and thereby to strengthen the respondent's hands in the present proceedings. The court therefore comes to the conclusion that the respondent's purported reinstatement fell far short of a genuine attempt to settle the dispute."

10.NF (Frans) Rautenbach 1990 "Remedying Procedural Unfairness: An Employer's Dilemma" (1990) 11 ILJ 466,

submitted that it is open to an employer to remedy a procedurally unfair dismissal through a bona fide offer of reinstatement. According to the learned writer, this is so as no principle of fairness or equity could ever endorse an approach whereby "an employer who has made a procedural mistake would bear it as an albatross around his neck for ever and a day." Put differently, "procedural non-compliance cannot be a bar to the ability of an employer to rectify mistakes." As pointed out by the writer, the condition, however, is that the offer must have been a genuine one and not a sham. He says it will be "difficult for the employee to establish that the employer was mala fide where he did not put the offer to the test by accepting it" and he himself will be tainted with mala fides where he "is holding out to force the employer to pay him more money and not because he is genuinely interested in a fair resolution of the dispute." This notwithstanding, "there are circumstances in which the employee could show that he did not accept the offer because the employer had no intention of holding a fair inquiry." The "motives of the employer will [thus] be open to scrutiny."

11. Mr Myburgh pointed out that Rautenbach's article dealt primarily with the question of whether or not an offer of reinstatement served to extinguish a claim of unfair dismissal. This is not the law applicable to the present case. Here the offer is a factor to be considered in exercising a discretion to award or not to award compensation.

12. A series of cases followed in which the Industrial Court and Labour Appeal Court refused to come to the relief of applicants who had refused offers of reinstatement made by their employers with a view to curing procedural defects. These included *O'Reilly v Graaff-Reinetse Ko-operatiewe Winkels Bpk* (1991) 12 ILJ 1360 (IC); *SA Railway & Harbour Workers' Union & another v BOP Air (Pty) Ltd & another* (1994) 3 LCD 74 (IC); *Fijen v CSIR* (1994) 3 LCD 180 (LAC); *Jele & others v Alpha Metal Processors* (1994) 4 LCD 230 (IC); and *Fletcher v Grayston Preparatory School* [1995] 5 BLLR 58 (IC).

13. During this period the Industrial Court handed down two judgments in which it came to the relief of the applicant employees notwithstanding their rejection of offers of reinstatement. In the first of these cases, *Usher v Linvar (Pty) Ltd* (1992) 13 ILJ 233 (IC), the court found that the offer of reinstatement did not resolve the dispute as it was an inadequate and insufficient offer and not equivalent to the best relief the court could provide. In the second, *Boshoff v Slit Steel (Pty) Ltd* [1996] 1 BLLR 42 (IC), it found that an offer made at the last moment and at a time when the employer knew that the employee had obtained alternative employment was not bona fide and accordingly it did not serve to resolve the matter.

14. In *Grayston Preparatory School* the employee's response to an offer of reinstatement was that he would only come back if the employer agreed to guarantee his continued employment until his retirement date. The court found that this condition was "patently unreasonable" and would have placed the employee in a far better position than that pertaining at the time of his dismissal. As he could have fully mitigated his loss by the acceptance of the offer, the court went on to find that the employee could hardly complain that he had suffered any loss that would entitle him to compensation.

15. In *Johnson & Johnson (Pty) Ltd v CWIU* [1998] 12 BLLR 1209 (LAC), the Labour Appeal Court held that: "The nature of an employee's right to compensation under section 194 (1) also implies that the discretion not to award that compensation may be exercised in circumstances where the employer has already provided the employee with substantially the same kind of redress . . .or where the employer's ability and willingness to make that redress is frustrated by the conduct of the employee" (at 1220C-E). Applying the principle, the court went on to exercise its discretion against awarding compensation as the employees had, by refusing an offer of reinstatement, "prevented the employer from remedying a defect in form and from giving [them] redress earlier." Moreover, the effect of awarding compensation "would be to reward the union and the employees for their unreasonable obstinacy." (At 1222E-F, I-J).

16.This judgment has been followed in a number of cases involving refusals by employees to accept offers of reinstatement / settlement made in an endeavour to remedy procedural errors. In each of the following five cases the courts refused to award compensation in circumstances similar to the present matter: *Burger v Alert Engine Parts (Pty) Ltd* [1999] 1 BLLR 18 (LC) at 25C-H per Pooe AJ; *Fletcher v Elna Sewing Machines Centres (Pty) Ltd* [2000] 3 BLLR 280 (LC) at 290B-I per Jammy AJ; *Mkhonto v Ford NO & others* [2000] 7 BLLR 768 (LAC) at 771F-772B per Conradie JA; *La Vita v Boymans Clothiers (Pty) Ltd* [2000] 10 BLLR 1179 (LC) at 1189E-J per Francis AJ; and *Maloba v Minaco Stone Germiston (Pty) Ltd & another* [2000] 10 BLLR 1191 (LC) at 1201C-I per Jammy AJ. The principle was also recognised in *Scribante v Avgold Ltd (Hartebeesfontein Division)* (2000) 21 ILJ 1864 (LC) at 1874I-J per Damant AJ.

17.In *Du Toit v SASKO (Pty) Ltd* (1999) 20 ILJ 1253 (LC) Mlambo J granted compensation to an employee who had declined an offer of reinstatement. The initial response by SASKO to the employee's complaints about an unfair retrenchment was intransigent. It never really accepted that it had erred and it only offered reinstatement at a late stage. It was a combination of these factors that led Mlambo J to conclude that the company had not genuinely wished to redress the employee's position and that its actions were "akin to closing the barn door after the horse has been bolted" (at 1256G-1257F).

18.No evidence has been placed before me as to why Mr Basson rejected the offer of reinstatement. I can infer that he was anxious that Cecil Nurse would follow the correct procedures as it had engaged the services of Ms Sarah Smith, an expert in Labour law to advise it and chair consultations. His anxiety is understandable. But although he is entitled to job security this the law permits a fair dismissal due, inter alia, to operational requirements.

19.Mr Le Grange, who appeared for Mr Basson, submitted that his client was entitled to refuse the offer of reinstatement on the ground of considerations which came out of the testimony of Mr Mitchell. He submitted, with a great deal of cogency and not a little ingenuity, that the true and substantive reason for the dismissal of Mr Basson was his under performance. He had not sold anything. Fortnightly meetings may have been held with Mr Basson and other Bid staff but there was no attempt at counseling him. It was anticipated that he would have to break new ground, ground which, Mr Mitchell conceded, has proved impenetrable. This argument was something like a magician pulling a white rabbit out of a hat moments before the end of a show. Mr Myburgh, when his admiration for the trick had faded, argued that the magician was merely waving a red herring and that I should not be distracted by it.

20.The short answer to Mr Le Grange's submission is that it is a legal argument and its factual basis is absent. It was not the factual basis for Mr Basson's refusal of the tender. Moreover, the grounds for Mr Basson's dismissal did not only emerge during the evidence of Mr Mitchell. In his letter of 18 March, which was sent to Mr Basson after his dismissal, Mr Mitchell refers pertinently to "the downscaling of costs with regard to non-sales generating . . .entities and people which are at this stage not generating revenue." Mr Basson was not generating revenue. The downsizing was related to his alleged poor performance.

21.The purpose of Mr Basson's action is to claim redress for a wrong done to him by Cecil Nurse. In order to remedy this wrong he initially sought reinstatement and / or compensation. See the referral to the CCMA dated 30 March 1999. When he launched the present application he elected to claim only compensation. It is his right to make such an election. See s 193(2)(a) of the Labour Relations Act

22.Public policy requires that disputes be resolved by the parties to them either privately or, in the case of most labour disputes, through statutory conciliation. Cf *Gollach and Gomperts (1967) (Pty) Ltd v Universal Mills and*

Produce Co (Pty) Ltd and others 1978 (1) SA 914 (A) at 923 C-D. One of the ways to settle a dispute is for the respondent to comply with the grievant's legitimate claim. A bona fide tender to comply with the claim is all that the respondent need do save for consenting to judgment. Bona fides enters into the picture where the relief, as in a demand for reinstatement, require the co-operation of the respondent and is generally incapable of physical evaluation. If the grievant declines the tender then the respondent is protected against costs, interest and certain other consequences arising after the date of tender. See *Odendaal v Du Plessis* 1919 AD 470. A proper tender may also lay the foundation for the respondent to claim costs. If the grievant does not accept the tender the court may grant the grievant his or her relief but deny him or her costs and make an adverse cost order.

23. I have sketched the common law position. In the present case I am dealing with the exercise of a discretion to award or deny compensation for procedural fairness. This discretion must be exercised judicially. I also have a discretion to award compensation, not exceeding and amount equal to twelve months remuneration and not less than the statutory formula for redressing procedural unfairness. See s 194 of the Labour Relations Act. If no award is made regarding procedural fairness I am at liberty to award an amount which is just and equitable in all the circumstances but not exceeding an amount equivalent to twelve months remuneration.

24. Mr Basson was entitled to claim reinstatement or compensation regarding his patently unfair dismissal. He was not, however, entitled to both remedies in the Labour Court. He could have accepted the reinstatement which Cecil Nurse offered. If he had done so he may have had a common law claim for damages which he could have pursued in conventional court of law. His reinstatement would have led to a fresh attempt by Cecil Nurse acting under the advice of its attorney to comply with the company's obligations to adhere to fair labour practices. It may or may not have led to the dismissal of Mr Basson. If it did lead to his dismissal he would havae been entitled to rely on the new dismissal to found a claim in this court, if so advised. He would not have

been entitled to claim compensation for the old wrong. Mr Basson, however, wanted compensation and so he declined to afford Cecil Nurse the opportunity to rectify its conduct. On the date that he declined the offer, 19 April 1999, he would have been entitled to compensation in an amount equal to his remuneration between 18 March and 19 April, ie R14 100, assuming generously in his favour that the court would not be entitled to set off the salary which he received until the end of April. Mr Basson declined the offer and waited for congested rolls and the passage of time to increase his claim for compensation for procedural unfairness to an amount of R 169 200. See the remarks of Conradie JA in *Lorentzen v Sanachem (Pty) Ltd* (2000) 21 ILJ 1075 (LAC) at 1078A:

"An award has nothing to do with the magnitude of an employer's industrial relations transgression. It is a factor of the employee's wage level and the case load at the CCMA or the Labour Court. It has little of a true solatium about it. If the tribunal is busy the solace is large; if it is not, it is small."

25. It is not fair to award this amount to Mr Basson as a solatium for the procedural unfairness. To do so would be to reward obstinacy and opportunism. An award of compensation would bedevil bona fide attempts to settle a dispute amicably, an aim which the Labour Relations Act values highly.

26. I now turn to the question whether the dismissal was substantively unfair and whether I should award compensation to Mr Basson. It is possible that had Mr Basson accepted reinstatement that Cecil Nurse may have found another suitable position for him in the group. This was the testimony of Mr Mitchell. However this overlooks Mr Mitchell's letter of 18 March. In this letter he states that:

"We would also like to advise that a variety of alternative employment options have been explored within the group in order to secure the skills provided by yourself. However these have at this stage proven

unsuccessful..."

27.The fact of the matter is that Mr Basson's job security may have been saved. He had held other positions in the group and was not an unknown quantity.

28.Mr Basson has suffered a substantively unfair dismissal. He is entitled to some compensation for this. My approach to the quantum is influenced by some of the considerations mentioned above. The offer of reinstatement was, in truth, directed primarily at the procedural deficiencies although it cannot be discounted that the process may have secured Mr Basson a job elsewhere. Mr Mitchell's letter of 18 March has a bearing on this. Cecil Nurse adopted the position that having refused reinstatement he was not entitled to any relief. No tender of compensation was made. I am of the view that compensation in an amount equivalent to three month's remuneration would be just and equitable in the circumstances..

29.The second claim, contained in the statement of case, is a claim for the delivery of 2000 compulsory convertible debentures in accordance with an incentive scheme to which Mr Basson allegedly belonged. No evidence was led. A contract to this effect was not proved by way of evidence or an admission. Absolution from the instance will be granted.

30.I intend to deprive Mr Basson of his costs. Mr Basson declined to conciliate the dispute in a reasonable fashion. He held out for a handsome award. He challenged the bona fides of Cecil Nurse's offer, alleged that it was mala fide but declined the opportunity to place his version orally before this court. He pursued a claim for the delivery of debentures but did not proffer a shred of evidence in support of his claim.

31.I am indebted to Mr Myburgh for his well researched heads of argument on which I have relied heavily.

32.In the premises:

1. The respondent is ordered to pay the applicant R 42, 300 as compensation for his unfair dismissal.

2. Absolution is granted in respect of the claim for the delivery of debentures.

3. There shall be no order for costs.

Signed at dated at BRAAMFONTEIN on this 29th day of November 2000.

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A A LANDMAN

Judge of the Labour court of South Africa

:24, 27 November 2000

: 29 November 2000

: Adv O J Le Grange instructed by Biccari Bollo Mariano Attorneys

: Adv A T Myburgh instructed by Sarah Smith, Attorney