IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE No.3066/98

Applicant

AND

Respondent

JUDGEMENT

MOLAHLEHI AJ

INTRODUCTION

[1] The applicant, Mr Van Niekerk, who was employed as a financial manager by the respondent, Cheque Guarantee Service (PTY) Ltd, was dismissed on the 13 August 1998. The respondent runs a unique business of guaranteeing payment for merchants in the event clients pay by a cheque. An operational requirement was given as a reason for the dismissal.

[2] At the commencement of the hearing Mr Antonie, council for the respondent conceded that the dismissal was procedurally unfair. He further indicated that the parties agreed that the court did not have to concern itself with the issue of substantive fairness.

[3] The parties agreed that the applicant had the duty to begin and in this regard the applicant was the only witness who testified on his own behalf. At the end of the applicant's case the respondent closed its case without leading any evidence.

[4] In closing argument the applicant raised the issue of substantive fairness. In response the

respondent argued that the applicant was bound by the agreement which was concluded between the parties before the commencement of the hearing. As stated earlier the agreement was that the court did not have to determine the issue of substantive fairness. The applicant's legal representative denied knowledge of this agreement including the assertion that he had confirmed the said agreement at the beginning of the hearing.

[5] Conversely the tape recording of the proceedings revealed clearly that not only did the respondent place on the record the agreement but also that this was confirmed by the applicant's legal representative.

[6] Accordingly I find that the said agreement to be binding on both parties and therefore this court is precluded from determining the issue of substantive fairness of the dismissal.

BACKGROUND FACTS

[7] On the 31 July 1998 the applicant was summoned to a meeting at the managing director's office where he was told that his employment contract would be terminated because his position as a financial manager had become redundant. The redundancy was a result of the increased involvement of the financial director in the financial affairs of the respondent.

[8] The respondent offered to pay the applicant his notice pay in terms of clause 5 of the contract of employment and leave pay due to him. In addition the respondent undertook not to deduct the amount owing to it by the applicant.

[9] The above arrangements seem to have been acceptable to the applicant except that he requested that

the notice period be increased by an additional month. During the course of the same day, whilst in his office the applicant was approached by another staff member from Human Resources Department who handed him two documents to sign. He refused to sign the documents because one of them contained a confidentiality and restraint of trade clauses.

[10] Another meeting between the applicant and the respondent was held on the same day at about 3pm. At this meeting amongst other things the applicant was informed that he would be paid by a postdated cheque.

[11] After this meeting the applicant was again handed documents similar to those referred to above. He again refused to sign them. He was then advised that the directors were not willing to effect his payment unless he signed the said documents. He was also required to hand over his access card and was thereafter escorted out of the applicant's premises by a fellow staff member.

[12] On Monday 02 August 1998 the applicant telephoned the Human Resource Department and requested that he be given a cash cheque and not a postdated one as was initially indicated to him. He was later informed that the managing director was agreeable to his request but that the loan due by him would be deducted from his pay.

[13] Thereafter, the respondent telephonically contacted the applicant on 05 August 1998 and informed him that his cheque was ready. On arrival at the respondent's premises the applicant was informed that the managing director demanded that the applicant should sign the documentation referred to above before he can authorise his payment. He again refused to sign the documents.

[14] During August 1998 the managing director contacted the applicant and enquired from him as to what was the course of the delay in finalising his matter. The applicant informed him that he was unhappy with the treatment he was receiving from the respondent and specifically referred him to the change in the initial agreement of not deducting the loan due by him from his pay.

[15] The managing director advised him that he would as from then deal with the matter himself and that the agreement concerning the loan still stands. He then promised the applicant payment of monies due to him the following week.

[16] The following week, on the 17 August 1998, the applicant arranged a meeting with the managing director for the following day, 18 August 1998. At this meeting the applicant was presented again with the documentation referred to earlier. He again refused to sign.

[17] On 19 August 1998 the applicant informed respondent that he was not willing to sign the documentation and that, rather the loan should be deducted from his pay.

[18] On 24 August 1998 the applicant contacted the respondent concerning his notice pay. He was advised to speak directly to the financial director. He was then informed to collect his notice pay on the 28 August 1998. On arrival he was again told that he would not receive payment unless he signed the said documents. The applicant became angry and left without receiving his notice pay. He then declared a dispute and the matter was conciliated on the 10 October 1998. The respondent did not attend the conciliation meeting.

[19] On the 14 October 1998 and subsequent to the conciliation meeting, the applicant was advised by

the respondent to collect his notice pay. The notice pay was paid less the loan due by the applicant.

[20] On the 30 November 1998 the legal representatives of the parties convened a meeting where they unsuccessfully attempted to resolve the dispute through negotiation.

[21] On the 02 December 1998 the respondent through a faxed letter offered the applicant unconditional reinstatement. The letter reads:

"Johan Van Niekerk v Cheque Guarentee Services (Pty) Ltd

I am in receipt of your letter dated 1 December 1998, the contents of which have been noted.

My client wishes to attempt to remedy any alleged procedural irregularity that may have occurred in the above named matter.

I am therefore instructed by my client to make, as I hereby do, a ***with prejudice*** *offer in the following terms:*

1.Cheque Guarantee Services (Pty) Ltd offers Mr Johan Van Niekerk reinstatement on the same terms and conditions of employment with full retrospective back pay to the date of his last salary payment.

2.Mr Van Niekerk is requested to tender his services at Cheque Guarantee Services (Pty) Ltd on or before Friday 4 December 1998. Kindly call Mr Yoav Duek to arrange such details."

[22] The respondent replied in a letter 04 December 1998 which reads:

"Ek erken ontvangs van u skrywe gedateer 2 Desember 1998.

Die aanbod is hoegenaamd nie aanvaarbaar in die lig van u klient se optrede tydens die skikkingsonderhandelinge nie.

Ons wil u graag herinner dat tydens die skikkingsonderhandelinge is my klient gedreig met 'n siviele aksie weens vertrouensbreuk en is my klient meegedeel dat u klient hom gaan aankla by die Raad vir ouditeure (sic).

Ek bevestig verder dat u my persoonlik meegedeel het dat u klient geweldig kwaad is vir my klient. Onder die omstandighede is dit onmootlik vir my klient om weer diens te hervat aangesien die gevolg daarvan viktimisasie teen my klient sal wees.

Ons gaan met die verrigtinge voort en u word versoek om u dokumentasie onmiddellik te liasseer."

[23] The respondent expressed disappointment with the rejection of its offer by the applicant in a letter dated the 04 December 1998.

[24] The applicant testified that there were in essence five reasons why he rejected the offer of reinstatement. The reasons were:

24.1 He had obtained alternative employment in Zambia as from the 01 December 1998.

24.2 There would be duplication of positions between him and Mr Duek.

24.3 He feared victimisation because of the thread which was made by the respondent's attorney at the meeting of 30 November 1998.

24.4 The trust relationship between him and the respondent's directors had irreparably broken down because of their previous conduct.

24.5 That he would be retrenched again after the reinstatement.

THE LEGAL PRINCIPLES

[25] The respondent having conceded to the procedural unfairness of the dismissal, I have to exercise a discretion of whether or not I should grant compensation to the applicant for such unfairness. It is obvious that I have to exercise this discretion in a fair and judicial manner. (see Loretzen v Sanachem (PTY) Ltd (1999) 20 ILJ 1811).

[26] The Labour Appeal Court in Johnson and Johnson (PTY) Limited v CWIU (1998) 12 BLLR 1209 (LAC) introduced the notion of fairness in considering compensation for procedural unfairness. The court in this

regard at 1219J to 122E states:

"In exercising the discretion, in my view, relevant factors to take into account are the degree to which the employer deviated from the requirements of a fair procedure, whether the employer has already provided the employee with substantially the same kind of redress and whether the employer's ability and willingness to make redress is frustrated by the conduct of the employee."

[27] The interest of both the employer and employee has to be taken into account in exercising this discretion. (see RJ Fourie and another v Iscor Limited unreported J 1130/99 and Sign and Others v Mondi Papers 2000 21 ILJ 966 (LC).

[28] The applicant argued that in considering whether or not compensation should be granted to him, a global picture of the way he was treated should be taken into account. In this regard the applicant argued that I should take into account the fact that the offer was made only after the applicant filed the statement of case. The offer was also made after a period of four months.

[29] In distinguishing this case from the Mamabolo and others v Manchu Consulting CC (1998) 20 ILJ 1826 (LC), the applicant argued that the offers in that case were made after two months of the dismissal whilst on the other hand in this case the offer was made after four months. In addition the applicant argued that the offers in Mamabolo supra, were bona fide, whereas in this case it is not known whether the offer was bona fide or not. I do not find this argument in any manner to support the case of the applicant. Van Niekerk AJ in Mamabolo supra at 1834 par 35 states:

"The compelling consideration, however, is the offer (sic) made by the respondent and the attitude adopted by the applicants to those offers. There is no evidence to suggest that the various offers made by Muchunu were not bona fide, or as a genuine attempt to redress for the wrong he realised that he had committed by failing to comply with section 189."

[30] On the facts of the case before me I am mindful that had the respondent followed a fair procedure in dismissing the applicant the dispute may never have arisen. There is no evidence before me that suggests that the offer made by the respondent was not bona fide, or a genuine attempt to redress the failure to comply with section 189 of the Act.

[31] In addition to the unfair procedure followed prior to the dismissal the evidence of the applicant also presents a picture of unreasonable treatment by the respondent in insisting in him signing the confidentiality and a restraint of a trade document. A different picture emerges when this evidence is analysed closely.

[32] The applicant under cross-examination conceded to the fact that the respondent in insisting that he signs the document was acting out of an abundance of caution as the confidentiality and the restraint of a trade clause were part of the contract of employment. It seems to me that the applicant saw the request for him to sign the documentation as an opportunity to indirectly bargain for his release from the confidentiality and the restraint of trade provisions in his contact of employment.

[33] I now return to the offer of reinstatement by the respondent. The applicant conceded under cross-examination that the offer was intended to redress the procedural unfairness of the dismissal and was unconditional. The gist of this matter, therefore, is whether the applicant by rejecting the offer frustrated a bona fide attempt to redress the procedural defect in the dismissal. This calls for an investigation to determine whether the applicant was justified in rejecting the offer.

[34] The first reason given by the applicant for rejecting the offer was that he had obtained employment in Zambia on the 01 December 1998. He was to start his duties on 03 December 1998. The letter rejecting the offer is dated the 04 December 1998. There is no satisfactory explanation as to why this was not communicated to the respondent in the letter rejecting the offer. In my view, taking

into account the time frames this reason is very suspect. I agree with the respondent that the probabilities suggest this as an after-thought on the part of the applicant which was intended to bolster his case.

[35] The second reason advanced by the applicant is that, acceptance of the offer would have led to a duplication of positions between him and Mr Duek. This in my view cannot be a valid reason for rejecting an offer to redress an unfair dismissal. The question is, if indeed this was a problem why was it not raised in the letter or at least raised with the respondent before the offer was rejected.

[36] The third reason advanced by the applicant for rejecting the offer is fear of victimisation by the respondent. There is no evidence of prior victimization of the applicant on the part of the respondent. The allegation of victimisation arose because of the alleged threat to report the applicant to the Board of Chartered Accountants by the respondent's attorney. It was alleged that this threat was made at the negotiation meeting held at the offices of the attorneys for the respondent.

[37] I have difficulties in appreciating the alleged threat as a reason for rejecting the offer. The applicant could not, under cross-examination, explain why would he be reported to the Board of Chartered Accountants. He further could not recall asking the respondent's attorney why would he be reported to the Board. There is no evidence as to why the applicant's attorney did not object and take issue with the respondent for making the alleged threat at the time it is alleged to have been made. It is surprising that both the applicant and his attorney did not enquire as to what offence did he commit to warrant a report to the Board.

[38] In my view the perception of victimisation on the part of the applicant has not been supported by evidence and accordingly should be treated as unfounded.

[39] The fourth reason given by the applicant for rejecting the offer of reinstatement is that he feared that the respondent would immediately after the reinstatement embark on a proper retrenchment process. For obvious reasons this cannot be regarded as a good reason for rejecting the offer to redress a procedural defect in the dismissal.

[40] The last reason given by the applicant for rejecting the offer is that the trust relationship between him and the respondent has irretrievably broken down. Except for the alleged unreasonable conduct on the part of the respondent, there is nothing to substantiate this allegation. It cannot however be denied that the dismissal impacted negatively on the trust relationship between the parties. In my view, in the circumstances of this case, the damage done to the trust in the relationship would have been mended after a short period of time had the applicant accepted the offer of reinstatement.

CONCLUSION

[41] I find the dismissal of the applicant to have been procedurally unfair. I further find that the offer of reinstatement by the respondent was a genuine attempt to redress the procedural unfairness of the dismissal. This attempt was frustrated by the applicant.

COSTS

[42] If costs were to follow the result, I should order the applicant to pay the respondent's costs. Taking into account the circumstance of this case and the fact that the offer to redress the unfairness of the dismissal was only made after the dispute was referred to the Commission for Conciliation Mediation and Arbitration (CCMA), fairness and justice would be done by making no order for

costs.

ORDER

[43] I accordingly order as follows:

43.1 The dismissal of the applicant was procedurally unfair.

43.2 In terms of section 194 (2) I determine that no compensation is payable to the applicant.

42.3 There is no order as to costs.

Molahlehi AJ

15 September 2000

For the Applicant:

Adv. M.M. Atonie

Leppan Beech Attorneys