JUDGMENT

Sneller Verbatim/ssl
IN THE LABOUR COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)
BRAAMFONTEIN CASE NO: J164/99
2001-06-07

In the matter between
A L HERBST & OTHERS Plaintiff
and
FIDELITY GUARDS Respondent

J U D G M E N T

PILLAY J: This is an alleged retrenchment dispute which was argued on agreed statement of facts.

The first issue the court is required to determine is whether the applicants were retrenched on or about 30 September 1998. On 15 September 1998 the respondent advised the applicants individually in writing as follows:

"We now give you formal notice of retrenchment which will become effective on 30 September 1998."

The notice went on to state:

"We thank you for your services with the company and wish you every success for the future."

This notice unequivocally terminated the services of the applicants on grounds of retrenchment.

The next question was whether in law the respondent could unilaterally revoke the retrenchment and reinstate the applicants and whether the applicants were in fact reinstated subsequently. A general principle of the Common Law of Contract is that once notice of cancellation of a contract is given it cannot unilaterally be revoked. *Wallis, Labour & Employment Law*, Butterworths 1992 at 10 Part 5. This principle is applied evenhandedly to employers and employees, thus an employee its notice of resignation without leave of the employer. *Rustenburg Town Council v Minister of Labour & Others* 1942 TPD 220. Similarly it has been held that an employer may not revoke its retrenchment of employees unilaterally. *Du Toit v SASCO (Pty) Ltd* 1999 20 IOJ 1253 LC and *McCullough v Kalvinator Group Services of SA (Pty) Ltd* 1998 19 IOJ 1399. Nor can employer withdraw its acceptance of an offer of voluntary retrenchment if it transpires that the employee's is no longer redundant. *National Employees Trade Union & Other v Kalvinator of SA*, case number J480/97, unreported. The respondent could not therefore unilaterally revoke the notice of retrenchment.

It was submitted for the respondent that as the retrenchment was unlawful everything done in terms thereof and consequent thereto would also have been unlawful, more specifically no severance pay or compensation was payable.

The appropriate method of remedying such a situation was to revoke the notice of retrenchment so to return to the *status anti quo*. As the respondent had revoked the notices, alternatively offered to reinstate the applicants the latter's refusal to return to the *status anti quo* was unfair, so it is submitted for the respondent. To this the applicant replied that the respondent had not unequivocally

signalled that it withdrew the retrenchment because it acknowledged that it had erred. The applicants were entitled to be sceptical about the respondent's intention and motives. Furthermore, as it transpired further retrenchments occurred after about October 1998, so it was submitted for the applicants.

On 1 October 1998 after the notices of retrenchment took effect the applicants attended on the respondent to *inter alia* return their uniforms and be informed about the retrenchment packages. The respondent advised them that they had not been retrenched and that the respondent would endeavour to obtain alternative permanent employment with the group for them. They were also advised that they needed to report daily for duty and would be paid their normal remuneration. None of the applicants reported for duty from 2 October 1998. The applicants were of the view that they had been retrenched unfairly and that they should be paid severance packages. They advised the respondent accordingly. The offer to retain the applicants in employment and to find alternative employment for them was also communicated on 2 October 1998 to the trade union representing the applicants.

On 9 October 1998 the applicants were instructed to report for duty, on 13 October 1998 failing which they would be deemed to have deserted and their services would be terminated. None of the applicants reported for duty as instructed.

On 14 October the respondent sent another telegram to each of the applicants to advise that a disciplinary inquiry would be held on 16 October 1998 on a charge of desertion as a result of their failure to report for duty on 13 October 1998. The inquiry proceeded in the absence of the applicants who were then dismissed for desertion.

By adopting an unlawful procedure for retrenching the applicants the respondent terminated the contract of employment unlawfully. Even if this conclusion is wrong it was common cause that the respondent had not complied with the provisions of Section 189 of the Labour Relations Act 66 of 1995. The respondent had therefore committed a material breach of an essential statutory term implied in the contract of employment. *Wallis, Contract of Employment*, paragraph 34 and 12, footnote 2(a).

As a result of such breach the applicants were entitled to elect whether to accept the repudiation and cancel the contract or reject the repudiation and claim enforcement thereof. By their conduct the applicants clearly accepted the repudiation and cancelled the contract. The remedy available to the applicants on cancellation would be a claim for damages. *Christie, The Law of Contract in South Africa* 3rd edition 596-8.

In terms of the Labour Relations Act this is pegged at 12 months' pay for unfair retrenchment. The election is a right which the Common Law confers on the innocent party to a contract that is repudiated. However, whether the innocent party exercises that right fairly is a matter of Industrial Relations Labour and Employment Law. In the interests of good industrial relations and the premise of employment a party who errs in terminating a contract of employment should be given an opportunity to remedy its fault unless there are compelling considerations not to do so, such as bad faith by the errant party.

On the agreed facts there is no evidence that the respondent acted in bad faith in recalling the applicants to work. If it were absolutely impossible in Labour and Employment Law for the respondent to remedy its fault at the earliest moment it may just as well capitulate there and then. Conciliation would be a farce, adjudication would merely be a rubber stamp of a foregone conclusion.

As it transpires the respondent did capitulate in this case by offering to return

to the *status anti quo*. It is speculative whether any of the applicants would have remained in employment beyond the October 1998 retrenchment. However, as notice of the further retrenchment had been issued on 13 October 1998 the applicants could reasonably have been apprehensive about their job security. Their cancellation of the contracts was therefore not unreasonable. Their demands at the time for severance pay only was also not unreasonable.

The dismissal for operational reasons was the court finds, and is admitted, to be unfair. The respondent was entitled to offer reinstatement which the applicants legitimately refused. Having refused such reinstatement the applicants accepted their dismissal. In so doing they limited their claim to severance pay only.

In the circumstances the court makes the following order:

The respondent is ordered to pay the 23 applicants listed in paragraph 1 of the stated case severance pay at the rate of one week per year of service and costs of suit.

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