IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NUMBER: C924/2009

DATE: 19 OCTOBER 2010

In the matter between:

KEITH PIGGOT Applicant

and

SILVERCROSS HELICOPTER CHARTERS

(PTY) LIMITED Respondent

J U D G M E N T

STEENKAMP, J:

INTRODUCTION

This matter was referred as a dispute about an alleged unfair dismissal for operational requirements. The applicant, Mr Keith Piggot, is represented by Mr Graham Leslie, instructed by Raymond McCreath Attorneys. The respondent, Silvercross Helicopter Charters (Pty) Limited, was initially represented by Bagraims Attorneys. Bagraims filed a notice of withdrawal of

attorneys of record and they were replaced by Gillian & Veldhuizen Incorporated on 29 July 2010. Prior to that date, on 24 June 2010, Bagraims Attorneys had been notified that this matter would be heard from 18 to 20 October 2010. However, subsequent to their withdrawal, the registrar notified the new attorneys of record, that is Gillian & Veldhuizen, that the matter would proceed today, that is 19 October 2010. That notice was sent to the respondent's attorneys of record on 27 September 2010.

When the matter was called this morning, neither the respondent nor its attorneys of records were present. Neither had they filed any notice or any other correspondence with this Court to explain their absence. Mr Leslie informed me from the bar that his attorneys had also not been notified that the respondent would not be present here this morning. Mr Leslie did, however, quite properly, alert me to an application for provisional liquidation that the respondent had filed with the Western Cape High Court under case number 22599 on 12 October 2010, that is a week ago. However, the respondent has not sought to suspend these proceedings and has not filed any such application.

Effect of application for liquidation

In terms of section 358 of the Companies Act[1], at any time after the presentation of an application for winding up and before a winding-up order has been made, the company concerned or any creditor or member thereof may, where any action or proceeding by or against the company is pending in any court in the Republic, apply to such court for a stay of the proceedings. However, as I have stated, no such application for a stay of these proceedings has been brought in this court, or for that matter in any other court, as far as I'm aware. Furthermore, section 359(1) of the Companies Act reads as follows:

> "When the court has made an order for the winding-up of a company or a special resolution for the voluntary winding up of a company has been registered in terms of section 200 -
>
> a) all civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator."

In this regard it is clear that no court has made an order for

1 that is the Act currently in force, namely Act 61 of 1973

the winding up of the respondent company. The company has merely launched an application for such winding up. Apart from the clear wording of that section, I also refer to the judgment of Davis, J in the Cape Provincial Division in L L Mining Corporation Limited v Namco (Pty) Limited (in liquidation) & Others 2004(3) SA 407 (CPD). In that case the first respondent had approached the Western Cape High Court for an order suspending proceedings in terms of section 359(1) of the Companies Act and Judge Davis said the following at page 413 F-H:

> "None of the authorities cited by fourth respondent appear to contradict the finding that the literal wording of section 359(1) should apply, that is that the suspension applies once the Court has made an order of liquidation. The very wording of section 359(1)(b), which includes the phrase 'after the commencement of the winding up', supports the conclusion that the legislature was alive to the application of section 348 and that in respect of the balance of the section, the critical date was the actual date of the order as opposed to the lodging of the application, in which case section 348 would have applied."

In the case before me, as I have stated, even though an

application for winding up has been made, no order has been granted and, therefore, there is nothing in the Companies Act to suggest that the proceedings before me should be stayed. Also, as I have stated, the respondent has not brought any such application. In these circumstances I rule that the matter should proceed in the absence of the respondent.

Condonation

The second preliminary point concerns an application for condonation by the applicant. The referral of the statement of case was one week late. The explanation for that is, in short, that the applicant, who is a single employee, had initially referred a dispute to the CCMA in circumstances where he had been told in terms by the respondent that he was the only employee to be retrenched. To his surprise, at the CCMA, the respondent raised a jurisdictional point that it contemplated dismissing more than one employee for operational requirements and, therefore, that the CCMA did not have jurisdiction. He then consulted his attorneys and they referred the matter to this court. That is the reason why the referral was referred one week late. I accepted, at the beginning of these proceedings, that the delay was not extensive, that there was a good explanation for the delay and that it did not cause any prejudice to the respondent. In those circumstances I granted

condonation and ruled that the matter should proceed.

The merits

That brings me to the merits of the claim that comprises both a prayer for compensation for unfair dismissal, as well as a number of contractual claims. The background, in brief, is that the applicant, Mr Piggot, was employed by the respondent as chief operations officer. He commenced employment on 1 June 2008, but did not sign a contract of employment at that stage. Instead he drafted what was called a *memorandum of agreement* to apply to the employment relationship and sent it to the respondent in January 2009. Despite further correspondence and discussions between the parties, this contract was never signed. However, Mr Piggot stated under oath that the parties conducted the employment relationship according to the material terms of that contract of employment. In the absence of any evidence to the contrary, I accept that.

The terms of that contract that are material for the purposes of the dispute before me, are the following:

(1) The applicant's basic salary was to be R55 000,00 per month.

(2) The applicant was entitled to commission which was to be worked out according to a formula, setting out minimum and maximum parameters, but was, in short, to be calculated to be equal to 1% of the respondent's "field operations income".

(3) Termination of the contract was subject to three calendar months' written notice.

(4) Dismissal for operational requirements would entitle the applicant to severance pay of one month's salary for each completed year of continuous service and not the statutory minimum of one week's remuneration for each completed year of continuous service.

(5) The applicant was entitled to 28 calendar days' paid annual leave.

I pause to note here that the applicant's testimony is that he was not paid his salary for June 2009, although he was dismissed with effect from 30 June 2009. I will return to that aspect.

Dealing with the circumstances of his dismissal, as I have said

the applicant was dismissed with effect from 30 June 2009. The respondent stated that this was on account of its operational requirements. However, the applicant was first informed, in writing, by the respondent on 9 April 2009 that his employment contract would be terminated with effect from 30 June 2009. The respondent sent this letter without having complied with any of the requirements of section 189 of the Labour Relations Act 66 of 1995.

The applicant consulted his attorneys and on 4 May 2009, his attorneys sent the respondent a letter, pointing out its failure to act in terms of the Act. The respondent, quite wisely, took legal advice as well and its attorneys, in a clear attempt to rescue its client, sent the applicant's attorneys a letter on 21 May 2009, informing them that the retrenchment was "lifted with immediate effect" and asking the applicant to return to work on 25 May 2009.

After his return to work, on 26 May, the respondent sent the applicant a notice that purported to be in compliance with section 189(3) of the LRA. Mr Leslie submitted, and I agree with him, that at this stage the retrenchment of the applicant was already a *fait accompli*. This became clearer in the ostensible consultation process that followed. There was a consultation meeting on 8 June 2009. The meeting was

attended by the applicant, his attorneys and the respondent's attorneys. According to the applicant, it was clear that there was no attempt on the side of the respondent to go through a joint consensus seeking process, but that it was merely going through the motions in order to attempt belated compliance with section 189 of the LRA.

After the meeting of 8 June, the company responded to the applicant with a written document entitled "Company Response to Cursory Minutes of First Consultation at Silvercross". In this document the company responded to certain issues raised by the applicant in the meeting of 8 June. The document concluded by stating:

> "Considering the above, management are (*sic*) of the view that retrenchment is necessary and that a final consultation needs to be engaged on in respect of the remaining points of the section 189 notification."

The document was signed by one Dalia Lichtenstein, who called herself "facilitator". It did not mention that Ms Lichtenstein was in fact the respondent's attorney and was its attorney of record until their withdrawal that I alluded to earlier. Following that letter, a second and final meeting was held on 30 June 2009. This meeting was again attended by the

applicant, his attorneys and the respondent's attorneys. On the same date the respondent sent the applicant a "letter of retrenchment", indicating that he would be retrenched from that day, i.e. 30 June 2009. In that letter, the respondent also undertook to pay the applicant's salary for June 2009; one month's notice; 15 days' leave pay; and severance pay equal to one week's remuneration. However, to date, the respondent has not paid any of these amounts.

The onus is, of course, on the respondent to show that the dismissal of the applicant for operational requirements was fair. In the absence of any evidence by the respondent, I can rely only on the evidence by the applicant. From that evidence the dismissal was blatantly unfair. This is so for, *inter alia*, the following reasons:

(1) The respondent has not given any evidence of a need in general to retrench.

(2) The respondent presented the applicant with a *fait accompli* in circumstances where it had already decided to dismiss him, despite its belated attempt to comply with section 189.

(3) The respondent did not apply selection criteria that were either agreed upon or that were fair and objective.

(4) The respondent failed to consider alternatives to retrenchment.

The dismissal was also procedurally unfair in that the respondent failed to comply with the requirements of section 189. I say so in the light of the evidence given by the applicant that points to a belated attempt by the respondent to pay lip service to section 189 without attempting to reach consensus. The respondent has also failed to pay the applicant what is due to him in terms of the contract of employment and I have to accept, in the light of the evidence by the applicant, that those terms are included in the unsigned contract of employment to which I alluded earlier.

The applicant indicated that he is no longer interested in reinstatement. He asked instead for compensation to the maximum of what the Act allows, i.e. 12 months' remuneration. In response to a question from the Bench, he told me that he managed to find employment with an acquaintance, operating under the name and style of Litson & Associates, as an aviation consultant after some consultations in the beginning of this year, 2010. He was employed on a "when needed" basis, as he explained, and in the first six months of this year, that is from January to July 2010, he managed to earn, on average,

about R30 000,00 per month. That amount has improved subsequently to about R45 000,00, but I am concerned mainly about the period of 12 months from his date of dismissal, that is from 30 June 2009 until 30 June 2010.

Although I am enjoined by the Act to order compensation and not damages, I have to apply my mind to what is just and equitable. In those circumstances I do think that I need to take into account the income that the applicant has managed to generate during the first six months of this year. That amounts to approximately half of what he was earning with the respondent. In my mind it would be just and equitable to order compensation equivalent to nine months' remuneration. The applicant has also shown that he is entitled to the contractual amounts sought.

I, therefore, make the following order:

(1) The dismissal of the applicant is procedurally and substantively unfair.

(2) The respondent is ordered to pay the applicant compensation equivalent to nine months' remuneration, calculated on the basis of R55 000,00 per month.

(3) The respondent is also ordered to pay the applicant the following contractual amounts:

(i) Applicant's June 2009 salary in the amount of R55 000,00.

(ii) Payment of commission in the amount of R23 343,95.

(iii) Severance pay in the amount of R55 000,00.

(iv) Leave pay in the amount of R50 769,00, being the equivalent of 28 calendar days' leave.

(v) Notice pay in the amount of R165 000,00, being the equivalent of three months' notice pay.

These amounts must be paid to the applicant or into his attorneys' trust account within 10 days of the date of judgment. Respondent is ordered to pay the applicant's costs on a party and party scale, including the cost of one counsel.

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STEENKAMP, J

Date of hearing and judgment: 19 October 2010

For the applicant: Adv GA Leslie

Instructed by: Raymond McCreath Inc.

For the respondent: Gillian & Veldhuizen