

IN THE LABOUR COURT OF SOUTH AFRICA(HELD AT CAPE TOWN)CASE NO:

C204/2009

DATE:

23 FEBRUARY 2010

5 In the matter between:

LERATO LESOLO

APPLICANT

and

PETRO SOUTH AFRICA LTD

RESPONDENT

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J U D G M E N TCHEADLE, AJ:

[1] This matter started out life as a statement of claim for the reinstatement of the applicant and compensation based on allegations to the effect that he had been charged for misconduct that was both substantively unfair and procedurally unfair.

[2] One element of the statement of claim was to the effect that in order to get rid of the applicant, the respondent employer had offered the applicant a salary package on condition that the applicant resigns from the respondent's employ. Then, in his description of the legal issues arising from the facts set out in his statement of claim in Bundle A pages 19 and onwards, it is stated there that the dismissal was substantively and procedurally unfair

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because no fair reasons relating to conduct were given and there was a failure to adhere to the principle of *audi alteram partem* (15.1). Furthermore, he claims that the dismissal was automatically unfair in terms of section 187(1)(c) and (1)(d) in that the respondent dismissed him for initiating an investigation against the chief financial officer; for approving the National Intelligence Agency to conduct a sweep at the company's offices; and for having rejected the voluntary salary package offered to him by the respondent. He also claims that he was dismissed for exercising his rights under the LRA in contravention of section 5(1) of that Act.

[3] Accordingly, there are two aspects of section 187 that are at play. The first is the automatically unfair dismissal for compelling an employee to accept a demand in respect of any matter of mutual interest between the employer and employee (187(1)(c)); and 187(1)(d) that the employee took action or indicated an intention to take action against the employer by exercising any right conferred by this Act. The same applies in respect of section 5(1).

[4] The respondent denies that the dismissal was unfair insofar as it was based on the applicant's conduct and

denies both factually and legally that what has transpired is an automatically unfair dismissal under section 187(1)(c).

5 [5] In the pre-trial minute the parties agreed at Bundle A94 paragraph 4.1:

10 “The parties agreed that as a means of shortening the proceedings as a matter of convenience and hope of saving unnecessary costs and waste of time that the Court will be required to determine as an initial issue and before any other issues in dispute, whether or not the dismissal of the applicant was such that he is entitled to claim that the dismissal was automatically unfair in terms of 15 187(1) of the Labour Relations Act.

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Should the applicant succeed in the initial issue the only remaining question will be one of *quantum* and should the respondent be successful in the initial 20 issue that will bring an end to these proceedings in this Court and this Court having no jurisdiction to determine the dispute since it is required to be referred to arbitration under the auspices of the Bargaining Council in section 191(5) of the Act”.

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[6] I requested argument yesterday on whether or not the facts as pleaded gave rise to an automatically unfair dismissal as contemplated in section 187(1)(c) and (d). Insofar as 187(1)(d) is concerned, the allegations made at page 20 of Bundle A are that the respondent dismissed the applicant for initiating an investigation and approving a sweep by the National Intelligence Agency. This the applicant argued constituted a contravention of section 5(1) and an automatically unfair dismissal for exercising a right conferred by the LRA.

[7] Neither of those are actions constitute a right conferred by the Labour Relations Act. They may be rights and duties imposed by the contract but they are not rights that are conferred on the applicant by the Labour Relations Act and that is why I made the ruling that I did this morning.

[8] Insofar as 187(1)(c) is concerned and the allegation that he was dismissed for having rejected a voluntary salary package offered to him by the respondent as it is pleaded, I was troubled as to whether or not it fell within the ambit of section 187(1)(c), but given the fact that the parties had themselves specifically reserved these as facts in dispute to be determined by the Court (page 91

paragraph 3.4) I decided that I would hear evidence on that limited issue. Much of the evidence, however, went much wider than was necessary.

5 [9] Very briefly, the background of this matter is that the applicant was the chief compliance officer of the respondent. As such he received complaints, initiated investigations, prepared reports and the like. He received whistle-blower reports concerning the chief
10 financial officer in September 2007 and in December 2007 supplied those reports to the chief executive officer.

[10] In April 2008 there was a whistle-blower report in respect
15 of the chief executive officer himself. Then in April (according to the applicant) or May (according to the the chief executive officer Mr Lukiso who gave evidence), the applicant was given a proposed settlement agreement, which is Annexure M in Bundle B at page
20 177. The proposed agreement was drafted by Edward Nathan Sonnenberg and provides that the company and the employee agree to sever their employment relationship by mutual agreement on various terms which involve the payment of a lump sum of three months' salary and all the other payments that follow up
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termination. It also deals with tax liability, the medical aid and retirement fund, all issues that are typically associated with termination and also a confidentiality clause which recorded that the terms and conditions of the agreement be kept confidential.

[11] It is common cause that he was given that settlement agreement by the chief executive officer and that two or three days later the applicant returned and refused to enter into the agreement. In September charges were brought against him and these charges were based on a report prepared by Edward Nathan Sonnenberg instructed by the chief executive officer through Mr Tobias, the chief legal officer, to investigate first of all the manner in which the investigations had been conducted by the applicant; whether or not there were breaches of the policy dealing with fraud and compliance; and thirdly the charges against the CFO himself. As a result of that charges were brought against the applicant and in December, after several hearings, the applicant was dismissed.

[12] Without having to deal with the probabilities as between the two contrary versions, just on the applicant's case alone this is what the applicant's case is. Applicant's

case is that investigations were initiated against the chief financial officer and that this led to some disharmony between the applicant and the chief executive officer. During the relevant times there was also a whistle-blower report against the chief executive officer and as a result of these investigations the chief executive officer tried to get rid of him by offering him a settlement agreement in the hope that he would then leave without any dispute. When the applicant refused to agree to the settlement charges were trumped up to get rid of him on other grounds and it is on that basis that he was dismissed.

[13] Insofar as the refusal of the agreement is concerned, he states that there were several reasons, the first is that he did not know why the settlement agreement was being given to him; he did not know the reasons for why it was necessary for him to leave; the contents of many of the provisions in the terms and conditions were ridiculous and particularly the confidentiality requirement and also that it had been unilaterally drawn up by the respondent's attorneys.

[14] The second important statement for the applicant is that the chief executive officer allegedly said "you are going to regret it I'm going to fire you" and this is in April 2008. He is then charged five months later after a refusal to sign. Importantly the applicant states that at the time of

the charges, the settlement agreement was no longer open for acceptance. After being put the same question several times he stated under cross-examination that by the time the charges were brought against him and he was dismissed, the settlement agreement was history.

[15] Now if we look at section 187(1)(c) one sees that the structure of the provision is such that the reason for the dismissal must be to compel the employee to accept a demand in respect of any matter of mutual interest. To translate that in the context of these facts, the applicant has to demonstrate that the reason for dismissal in December was to compel him to accept a demand, namely to agree to the contents of the settlement agreement, handed to him and refused by him in April 2008.

[16] There is no evidence of compulsion and that is what section 187(1)(c) requires. It may well be that his refusal to accept the settlement agreement may have triggered the charges, which on the applicant's version are "trumped up", but that does not mean that the charges were brought in order to compel him to accept the terms contained in the settlement agreement.

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[17] The applicant was given what was called a “settlement offer”, he responded to that offer by refusing it and it was only several months later that he was charged and several months after that that he was dismissed. On his own version that at the time of the charges and at the time of the dismissal the offer was no longer open for acceptance. That means that the dismissal in December 2008 could not have as its objective to compel the applicant to accept the settlement agreement that he had refused several months beforehand.

[18] When one looks at the decision in the Labour Appeal Court in Fryer’s Metals the interpretation of section 187(1)(c) supported by the Supreme Court of Appeal is that the dismissal has to be a conditional dismissal. In other words it’s a dismissal that will be withdrawn if the employee accepted the new terms or the demanded terms.

[19] It is quite clear from the facts of this particular matter, even on the applicant’s version, that the dismissal in December 2008 was not conditional and accordingly it is not the kind of dismissal that is contemplated by section 187(1)(c). It follows then that even on the applicant’s version he has failed to demonstrate that he was

dismissed in December 2008 to accept a settlement agreement in April 2008.

[20] Returning to the pre-trial minute it says that the Court
5 has to determine as an initial issue whether or not the
dismissal of the applicant was entitled to claim
automatically unfair in terms of section 187(1) and I now
find that it was not automatically unfair, that is my
determination. It then goes on to say "should the
10 respondent be successful in the initial issue that will
bring an end to the proceedings in this court, this Court
having no jurisdiction to deal with the other allegations
which are conduct-related allegations".

15 [21] I raised a concern as to the purport of paragraph 4.2 of
the minute, which states "once the initial issue has been
determined, the Court will be required to determine in
addition whether or not the respondent acted in
contravention of Schedule 8(2)(a) and (c) to the Act,
20 Code of Good Practice, which appears to deal with
probation. I was advised by the legal representatives of
the parties that that 4.2 should be struck from the pre-
trial minute and that there is nothing further for the Court
to determine other than the issue of costs.

[22] Accordingly, the limited issue that I was required to determine is dismissed and it is quite important to understand in that respect that all the other allegations in relation to the conduct and all of that still remains in dispute and has not been determined by this Court. That is also why I have refrained from dealing with the probabilities of the contending version in the evidence led before this Court because these factual disputes should more properly be decided before an arbitrator.

10 [23] On the very limited issue as to whether or not the conduct alleged in the statement of claim amounts to an automatically unfair dismissal that part is dismissed, with costs.

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CHEADLE, AJ