IN THE LABOUR COURT OF SOUTH AFRICA
(HELD IN CAPE TOWN)

CASE NO: C727/2010

In the matter between:

PUBLIC AND ALLIED WORKERS' UNION OF SOUTH AFRICA (PAWUSA) **Applicant**

and

SAKHIWO METSHE **Respondent**

JUDGMENT

LALLIE AJ:

[1] The respondent was employed by the applicant until he was dismissed for operational requirements. He challenged the fairness of his dismissal at the Labour Court. I found his dismissal both substantively and procedurally unfair and ordered the applicant to pay him remuneration equal to his 8 month's salary.

[2] In this application the applicant seeks leave to appeal against the quantum I awarded the respondent for the following reasons:

2.1 The Court erred in awarding the respondent 8 months' compensation as there is a reasonable prospect of another Court awarding the respondent less or no compensation at all because he was guilty of very misconduct.

2.2 The judge found that the respondent rendered it difficult or impossible for the applicant to comply with the consultation prescripts of Section 189 of the Labour Relations Act (LRA) and punished the applicant for its non-compliance.

2.3 While the applicant led evidence through Gavin Jood (Jood) that the respondent earned a basic salary of R6 500.00, the judge, without rejecting such evidence found the respondent's basic salary to be R8 500.00 leading to the respondent's compensation to be inflated by R16 000.00.

[3] The application is opposed by the respondent, mainly on the grounds that my decision is correct. He also sought interest on the amount awarded from the date of judgment.

[4] The Constitutional Court confirmed in *Zwane v Alert Fencing Contractors CC* [2011] 2 BLLR 109 (CC) that the decision appealed against must be susceptible to criticism and incorrect. This reasoning is consistent with the test for leave to appeal that there must be a reasonable possibility that another court might come to a different conclusion than the one reached by the court a quo.

[5] The applicant's submission that the decision to award the respondent 8 months' compensation is incorrect and based on its view that I found the respondent guilty of serious misconduct which involved the respondent denying its National Secretary, Ms Roseberry access to its Port Elizabeth office and threatening to harm her. According to the applicant I should have taken such misconduct into account in determining compensation to be awarded to the respondent because the respondent should not have benefited from his own misdeed. The applicant further argued that it is because of the respondent's misconduct that it was unable to comply with the requirements in Section 189 of the LRA.

[6] It is not correct that in paragraph 6 of my judgement I found that the respondent committed misconduct by threatening to harm Ms Roseberry and denying her access to the applicant's Port Elizabeth office. I made it clear in my judgement that the above allegations were made in the evidence that was led on behalf of the applicant. I further stated in paragraph 17 of my judgement that a dismissal for operational reasons is a no fault dismissal and cannot be used to justify an employee's unfair dismissal for misconduct.

[7] My decision that a dismissal for operation reasons should not be used to justify an employee's dismissal for misconduct is correct and not susceptible to criticism. The reality is that dismissing an employee for misconduct under the guise of dismissing him/her for operational reasons is unfair. No court will come to a different decision on whether the allegations of misconduct against the respondent should have been considered in determining the

amount of compensation due to him.

[8] In my judgement I gave full reasons for finding that the applicant failed to comply with its obligations in Section 189 of the LRA through its own fault and concluded that the respondent's dismissal was procedurally unfair. I found that the applicant decided to dismiss the respondent for operational requirements and determined the selection criteria before inviting the respondent to consultation. The notice inviting the respondent to the consultation is dated 11 November 2008 and the respondent was supposed to submit a proposal on consultation by 13 November 2008. The applicant failed to deliver to the applicant the notice inviting him to the consultation. I am convinced that I was correct in finding the respondent's dismissal for operational reasons procedurally unfair in those circumstances. The applicant's submission that the respondent is responsible for its failure to comply with provisions of Section 189 of the LRA is incorrect.

[9] The applicant's argument that another court may grant the respondent less or no compensation at all is not correct. The employer's right not to pay employees dismissed for operational reasons is limited to those employees who unreasonably refuse alternative employment. In the case before me that principle was irrelevant and no grounds existed for not granting the respondent compensation after finding his dismissal both substantively and procedurally unfair.

[10] In the pre-trial minute signed by the parties on 9/10/2010 the parties agreed that the respondent's basic salary was R8 500.00. The applicant was represented by the same Jood who was its representative and witness at the trial. He confirmed the

correctness of the contents of the pre-trial minute. The applicant's ground for leave to appeal that I erred in deciding that the respondent's monthly basic salary was R8 500.00 without rejecting Jood's evidence that it was R6 500.00 has no basis.

[11] The respondent sought interest on the amount awarded from the date of judgment. I may not deal with the question of interest at this stage because I did not deal with it in my judgment.

[12] Accordingly, the application for leave to appeal is refused.

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LALLIE AJ

Date of judgement: 28 September 2011

For the Applicant: Mr David Peters of the Applicant

For the Respondents: Mr Metshe