REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

C296/2013

In the matter between:

DOUGLAS WILFRED DAVIDSON Applicant

and

DOWN SYNDROME ASSOCIATION, WESTERN CAPE Respondent

Date heard: April 22 2014

Delivered: July 31 2014

Summary: Unfair retrenchment claim

JUDGMENT

Rabkin-Naicker J

[1] In his referral to this court the applicant prays that his retrenchment be declared an unfair dismissal and seeks compensation equivalent to 12 months remuneration. He was employed by the respondent, a non-profit organization, on 1 November 2009. On 1 February 2010, he was appointed on a permanent basis as regional director.

[2] The respondent (the Association) is a registered non-profit organization with its main objectives being to:

* provide and/or promote services for the care of persons with Down syndrome;

* provide a support function for parents, families and caregivers of persons with Down syndrome;

* Strive for positive cooperation with other organizations, institutions, government authorities (local, provincial and national) and persons for the purposes of promoting the interest of the Down Syndrome Association of the Western Cape and creating public awareness of persons with Down syndrome;

* to generate and obtain funds to achieve main and secondary objectives, which include to establish a home facility to accommodate adults with Down syndrome and support research in the field of Down syndrome.

[3] The Association is run by a management committee which is elected every two years and consists of at least seven members who are led by office bearers selected as chairman, vice-chairman, treasurer and secretary. The applicant pleads that during March 2012 he was mandated to draft and compile a strategic plan in a drive to obtain fundraising initiatives as the Association went through a financial crisis. He proceeded to propose a contingency plan in order to obtain the necessary funds by means of fundraising which plan he claims were ignored by the interim management committee.

[4] He pleads that as a result of this failure in September/October 2012, he started a retrenchment process by virtue of article 6.1 3.3 of the Association's constitution with eight of respondent's employees. Applicant pleads that section 189 letters were sent out to the various employees and the consultative process was followed as prescribed by the LRA. On 30 November 2012, the applicant himself received a certificate of service which confirmed that his employment was terminated as a result of retrenchment in terms of section 189 of the LRA. Although the applicant was in charge of the retrenchment process, he claims he was never given formal notice of his

proposed retrenchment and was not consulted and was presented in effect with a fait accompli.

[5] The following facts, inter alia, are included in the pre-trial minute as common cause:

5.1 In 2011 the respondent applied to the National Lottery Distribution Trust Fund for funding for the 2012 financial year. However, the respondent failed to secure funding for that year.

5.2 The applicant was an ex-officio member of the management committee.

5.3 During March 2012 respondent mandated applicant to draft and compile a six-month contingency plan in a drive to obtain fundraising initiatives as respondent at the time face financial difficulties due to the fact that it had not received any funding from the National Lottery Distribution Trust Fund for 2012, which application for funding was still pending.

5.4 The contingency plan prepared by the applicant consisted of plan A: "turnaround strategy for financial stability" and to plan B: "if turnaround strategy has failed – Retrenchment Strategy".

5.5 In terms of the contingency plan, in the event that the respondent was unable to secure the required donor funding in terms of plan A, the potential retrenchment of staff was considered as a means to reduce the respondent’s expenditure as set out in plan B.

5.6 During 2012, the respondent had a total staff complement of nine employees, including the applicant.

5.7 Of the nine employees employed by the respondent, three staff members were involved with the Umthi Project, an externally funded project whose funding had been secured for a further period of two years.

5.8 During October 2012, the respondent commenced retrenchment proceedings, as envisaged in terms of section 189 of the Labour Relations Act 66 of 1995. The applicant managed this process and was

assisted by Nicola Arendse, an attorney working for Bagraims Attorneys. It emerged by virtue of applicant's proposal that:

(I) Applicant would manage the retrenchment process in terms of section 189 of the LRA 66 of 1995;

(ii) Applicant commenced the proceedings on 25 October 2012, more fully described in applicant situational report;

(iii) Applicant was directed by aforesaid Ms. Arendse, who was co-opted as an MC member…. to comply with the prescripts stipulated in terms of the extract from section 189 of the LRA.

5.9 Notices of possible retrenchments as required in terms of section 189(3) of the Labour Relations Act 66 of 1995 ("the LRA") were issued to 8 of the respondent's employees on 25 October 2012.

5.10 The applicant, as the regional director held consultations with the 8 affected staff members of 25 October 2012.

5.11 On 2 November 2012 the applicant on behalf of the respondent issued five staff members with notices of terminations.

5.12 The applicant did not receive a notice of his retrenchment.

5.13 In terms of the notice the employee's final date of employment would be 30 November 2012.

5.14 Applicant approved the November 2012 statutory payments of the affected staff. The monthly approval of payments is mandatory in terms of GAAP (generally accepted accounting practice) and adherent to applicant's fiduciary duty.

5.15 Applicant's employment with the respondent was terminated on 30 November 2012.

Evaluation

[6] Given the above common cause facts, and that the applicant did not pursue his claim for substantively unfair retrenchment at the hearing, I highlight the issues regarding procedural fairness in this judgment. From the testimony in court I note that the applicant did not receive an initial 'intention of

retrenchment letter', which he sent to the other employees. But he did in fact sign receipt of a letter of retrenchment, together with the other affected employees on 2 November 2012. This was conceded by him in cross-examination and is indeed evidenced in documentary form in the trial bundle. He also conceded that he knew that this letter would be issued to him; in fact, he put his name on the list of signatories when he prepared the document. The applicant, however, persisted in his testimony to claim that he expected the management committee members to come and consult with him. He further testified that he only realized that the procedure of his retrenchment had been irregular, in that he was not consulted with, when he went to the CCMA. He agreed that he hadn't thought anything was wrong with the November 2 retrenchment letter he had signed at the time. Applicant also agreed that when he prepared the retrenchment payments and checked whether there were sufficient funds, he included himself in the said preparation.

[7] Unusually, it is not necessary in this judgment to record the evidence in summary of the respondent Association, which bears the onus to prove that the retrenchment was fair. This is because even on applicant's own version there is no basis to find that his retrenchment was procedurally unfair. He was himself in charge of the process of retrenchment and the architect of the strategy of the Association in this respect. He prepared for his own retrenchment and included his own name on the list of retrenches. He accepted his final notice of retrenchment letter by signing next to his name.

[8] From the evidence in court it was apparent that the applicant was personally aggrieved by his treatment by certain members of the interim management committee of the Association given his hard work in ensuring that his fiduciary duties were carried out. However, he simply did not have a case to bring to this Court and the proceedings were in fact a waste of the Court's time. However, I do take note that the witnesses before me, including the applicant, were all committed to the work of the Association and had become involved in its work due to the fact that they were parents of children with Down Syndrome. Certain problems between the members of the Association and those on the management committee were the context in which the applicant

became personally aggrieved. I mention this because I do not intend to make a costs order in this matter.

[9] In all the above circumstances I make the following order:

1. Applicant's claim is dismissed

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H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

Applicant: Visagie Vos Attorneys:

Respondent: S. Adams Attorney