IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO: JR 169/05

REPORTABLE

In the matter between:

AG'S DISTRIBUTORS Applicant

and

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	First Respondent
TSHAYANA THANDIWE N.O.	Second Respondent
NOMBOLO PHATHISA	Third Respondent
LUNGONGA XOLISE	Fourth Respondent
MGOMEZULU VICTOR	Fifth Respondent
MONYAMANE EPHRAIM	Sixth Respondent
LALA ENOCH	Seventh Respondent
GWABE LAWRENCE	Eighth Respondent

JUDGMENT

CASSIM, AJ

Background

1. On 31 December 2005, the second respondent, presiding as commissioner in the CCMA, the first respondent, found that the dismissal of the third to eighth respondents (hereinafter referred to as “the employees”) was substantively and procedurally unfair.

2. The commissioner made an award ordering the applicant, i.e. the employer, to pay ten months wages to each of the respondents. The commissioner did not make an order of reinstatement.

3. In argument, Advocate Lennox, representing the applicant, AG’s Distributors (Pty) Limited and instructed by Moni attorneys informed me that the employees earned approximately R2,000.00 per month at the time of the termination of the employment relationship, being the first week of April 2005.

4. By way of application dated 9 February 2006, the employer sought and was granted an order in this court staying the execution of the commissioner’s award dated 30 September 2005 pending this review application.

5. The review application was enrolled for hearing on 17 December 2008. I was reluctant to strike the matter from the roll arising from the contents of the file being, literally speaking, in shambles because of the following facts:

5.1. in all probability the employees have not had any income since April 2005.

5.2. the founding affidavit in the application to suspend the award is deposed to by Natasha Gina Moni ("Moni"), the employer's attorney. So too is the founding affidavit in the review application dated 16 November 2006. The relevance of this fact will become clearer in this judgment.

5.3. in the affidavit of attorney Moni in the review application, the court is told very little about the employer. In paragraph 4, the deponent states that the applicant is:

"AG's Distributors and is registered under the trading name of Sharatory Enterprises, a close corporation duly incorporated in terms of the provisions of the company laws of the Republic of South Africa and having its address in these proceedings care of its attorney of record whose details appear in the notice of motion to which this affidavit is attached."

5.4. I am prepared to a accept that attorney Moni may have made an error in stating under oath that the close corporation is incorporated in terms of the company laws – it must be in terms of the Close Corporations Act 69 of 1984, as amended. I am, however, disturbed at the paucity of information concerning the identity and role players of the employer party. In argument,

counsel for the applicant was unable to assist the court in relation to particulars of the employer party.

5.5. this review application was enrolled for hearing on 16 September 2008, but according to Moni's letter of 14 July 2008, the employer's counsel was unavailable to attend to the matter, and thus the matter was not heard on 16 September 2008. I do not know of the explanation and as to why another lawyer could not have been engaged during the period 14 July 2008 to 16 September 2008 to argue the review. I suspect that this was a ploy to delay the hearing of the review application. My suspicions arise from the facts of this case and the unspoken truth that the courts lean backwards under the guise of some mistaken notion that one must appear to be fair irrespective of the consequences this has to others.

6. Disputes must be resolved or finalised. The employees, together with their attorney, Mr Shigange, were present at court at the hearing before me. Counsel and an attorney from Moni's office (but not Moni) were in court. I invited the employer's legal representative to procure a representative from the employer at court, but they would not. I will revert to this aspect further in this judgment.

7. I resolved to deal with the review application. The papers were not properly paginated, nor complete. The responsibility to ensure that the

papers were in proper order vested in the employer. The employer brought the review application. In my view in the circumstances of this case, justice delayed would be tantamount to justice denied. The employees complained that their dismissal in April 2005 was unfair. A waiting period of two years and eight months renders illusory to claims of a fair legal system, in particular to a claim to protect the poor and the vulnerable and to redress injustices of the past.

The award

8. The dispute before the commissioner was not complex; the facts rather straightforward and the commissioner's analysis of the issues appear to be both cohesive and logical.

9. On 5 April 2005, the employees, upon entering the employer's premises, saw a fellow employee with physical bodily injuries. The latter individual informed his co-workers that he had been assaulted by the employer's security personnel. He further stated that these security people had intimated that other employees were to be assaulted.

10. The employees, before me, were it appears part of a large group that were incensed. This is understandable. Importantly, the only witness who testified for the employer, namely Sydney Naidoo ("Naidoo"), confirmed that an employee had been assaulted by the employer's security guards

and that the employer undertook to investigate the reason for the assault. Naidoo did not reveal to the commissioner the results of this investigation. Nor could the employer's legal representatives at the hearing before me throw any light on the outcome of these investigations. The only reasonable inference is that nothing was done about this assault.

11. The employees appointed a delegation to address the employer on this assault. Understandably, they were disturbed by what had happened. The commissioner recorded the response of the employer party in response to the employees' representations as thus:
"Management informed them that they should not tell them how to treat staff."

12. This arrogant attitude of the employer set the tone of the future events.

13. The employees felt threatened and proceeded to the offices of the South Africa Police Services to lodge a complaint. This was met by the employer responding to the police that the assault was being investigated. I have already pointed that in reality nothing came of the investigation or in fact there was no such investigation.

14. The employees returned from the police station. They were told to go home. It appears that the first ultimatum was issued. The evidence of the employees that they were told to go home appears not to be challenged.

In the result, the first ultimatum dated 5 April 2005 makes no sense. Nor does the second ultimatum of 6 April 2005 take the matter any further from the point of procedural fairness because as was testified on behalf of the employees that when they returned to work on 6 April 2005, certain Rafik told them:

"that they were dismissed he does not want them anymore. The following day they went back to work and were accompanied by the police. Rafik told them they were dismissed."

15. On behalf of the employees, it was further testified that some employees were subsequently taken back. This too remained unchallenged. Nor could the employer's legal representatives assist the court on this aspect. Advocate Lennox was pertinently asked as to the number of employees at the material time. He did not know. I asked to take instructions on this aspect. He was not given any further particulars to share with the court.

The issues

16. The commissioner correctly concluded that the employees were dismissed. First, Rafik did not testify. Secondly, the ultimatums made no sense. On 5 April 2005, the employees engaged their employer as to why a fellow employee was assaulted. This resulted in the employer being unsympathetic and uncooperative. The commissioner properly analysed the evidence to demonstrate that there was just and good cause for the

employees not working but proceeding to the police station. This, only after their delegation to the employer was badly dealt with. The issuing of an ultimatum in these circumstances was a strategy used by the employer for an improper purpose. The following day, the employees proceeded to the CCMA to complain about the ultimatum. On their return at 12h00, they were dismissed.

17. The commissioner correctly concluded that the employees were dismissed. On the common cause facts, it cannot be suggested that the employees were not prepared to work. They wanted to work but had a legitimate gripe which needed immediate attention. Physical assault is a serious intrusion of one's dignity. A fellow employee was assaulted and more of them were threatened with assault. Moni's affidavit in the application to stay the award made suggestions to the effect that the employees deserted bears no scrutiny to the true facts placed before the commissioner. The employer had no valid reason to dismiss the third to eighth respondents, and the ploy to use the ultimatum must, as found by the commissioner, fail on both substantive and procedural bases.

Selective re-employment

18. The evidence before the commissioner proved unfair conduct in that employees were randomly selected to continue employment. This was not refuted in the evidence before the commissioner. Rafik, the main

protagonist (and probably the beneficial owner of the employer) did not testify. He elected to selectively place facts before the commissioner.

19. At the hearing before me, as aforestated, I enquired as to the number of employees then and now in the employment of the employer. Advocate Lennox could be of no assistance. I requested he take instructions on this important issue. He conferred with the attorney representing the employer party in court, but told me that he could not take this issue any further. I think this was deliberate. I specifically requested a representative of the employer to be procured at court. I was determined to get to the true facts and deal with the dispute. The employer's legal representatives were unhelpful. I was not told as to why a representative of the employer could not be procured to attend court.

20. Advocate Lennox argued a host of esoteric points of law. He could, however, not explain why Rafik did not testify. Nor could he enlighten me on the number of employees not dismissed and the number of employees selectively re-employed.

21. He argued that the commissioner was overhaste and did not give Naidoo a proper opportunity to testify. I had difficulties in following this submission by reference to the transcript of the proceedings. Counsel could not point out the portion in the record to the effect that Naidoo was prevented from testifying. Nor could Advocate Lennox indicate to me the evidence that Naidoo wished to give, but was obstructed from doing so. I gave Advocate

Lennox the opportunity to say to me from the bar what evidence Naidoo was prevented from giving and the material significance of such evidence. Advocate Lennox could not. I have already indicated that neither Naidoo nor any other representative of the employer was available. I invited the employer's legal representatives that they procure the presence of such persons. The fault must lie with the employer. I stated I would permit Naidoo to testify if he had any facts of material significance to place before the court. If this assisted in the pursuit of a just decision, I would have allowed this. But Naidoo was, for an unexplained reason, not available. Nor was the court informed of the nature of evidence which he wished to tender. Accordingly, there was no merit in this argument on behalf of the employer.

Other considerations

22. The extraordinary failure to stem the tide of the schism between the have and have nots cannot be solely blamed on the government. The courts must accept their responsibility in this very important task to bring about social justice and to give effect to the meaning of the values enshrined in our Constitution.

23. The facts of this case illustrate the failure of the legal system we have inherited. There exist in our legal system an inherent bias in favour of the wealthy established class to the detriment of the poor and the vulnerable.

On 5 April 2005, an employee was assaulted. This person's physical being and integrity is violated. Nothing seems to have been done about this. The commissioner who is an important clog in the machinery of judicial administration does not enquire more about the assault. He should, in the least, have made enquiries as to:

23.1. who was responsible for the assault?

23.2. why the police did not take steps to prosecute the wrongdoer or wrongdoers?

23.3. what was the employer's role in the assault? Is there vicarious liability?

24. As much as we do not like to face it, our society is inherently depraved. The courts readily criticise the police and champion the cause of human rights. But whose rights? I suggest only those of the wealthy.

25. The commissioner takes his lead from the courts, i.e. the judges. How can we be proud of a legal tradition which has hopelessly failed the poor and the vulnerable.

26. The commissioner did not grant the primary relief of reinstatement to the employees who were unfairly dismissed. Instead, he ordered ten months wages as compensation. Four months later, this court grants an order

staying execution of payment without monitoring whether this recalcitrant employer would prosecute the review timeously. Of course, it did not.

27. The accepted rule of practice in our courts is that generally the execution of a judgment is automatically suspended upon the noting of an appeal. This is not an appeal but a review. In any event, the principles set out in **South Cape Corporation (Pty) Limited v Engineering Management Services (Pty) Limited** 1977 (3) SA 535 (A) is preoccupied with commercial considerations and in essence would permit execution provided the employees put up security. This reasoning is of little comfort to employees who have been unfairly dismissed earning a meagre salary of R2,000.00 per month. The reasoning in this judgment does not take into reckoning our new society founded in 1994 and which recognise as part of our Bill of Rights *inter alia*:

    27.1. everyone has a right to fair labour practices;

    27.2. everyone has the right to bodily and psychological integrity and the right to dignity.

28. Nor does the reasoning in the **South Cape Corporation** case have regard to the avowed purpose of our Constitution to redress the injustices of the past and to serve as a protection for the poor and the vulnerable. The employees earned R2,000.00 per month and hence they had no capacity to save. How can a court of law, in these circumstances, suspend the execution of a monetary award? Unless the system inherently favours the established class and the wealthy successful business class.

29. On 9 February 2006, the court ordered the suspension of the execution of the award pending the outcome of the review application. Twenty months later, the review is not heard because the employer's counsel is not available on 16 September 2008. The employer's attorney had the audacity to communicate with the court some two months prior thereto that the employer's counsel was not available, and therefore the matter must be postponed. Tragically, the matter is in fact postponed to the detriment of the poor and the vulnerable. The judiciary cannot escape the reality that it, too, is to be blamed for the justice system failing the most vulnerable of our people. Judges must be brave and innovative in our new society to reject the principles and policies of our judicial system inherited from a time when judges failed to protect the most vulnerable of our people. Our courts must be innovative to bring about change whereby the majority of people will feel that the law is meaningful. Judges must not be restrained by notions of fairness and justice which serve the interest of a few to the detriment of the majority.

30. The employer's legal representatives, in this case, were prepared to shield the true identity of the employer, their client. Only time will tell whether the employer honours the judgment of this court by making payment of the monetary award made by the commissioner in favour of the employees. If not, there may be joint and several liability in delict on the part of the employer's legal representatives in this case. I make this point to alert the employees of this fact.

Conclusion

In my view, this review application must fail. The commissioner's reasoning is eminently justifiable and I am satisfied that none of the grounds of review have any merit whatsoever. The award is, by all accounts, reasonably justifiable. Accordingly, the review application is dismissed with costs.

Leave to appeal

Upon granting judgment, Advocate Lennox predictably applied for leave to appeal. I granted such leave to the Labour Appeal Court provided each of the six employees are paid their ten months compensation plus interest thereon at the rate of 15,5% per annum forthwith and, in any event, by not later than 30 January 2009. I consider the imposition of this condition as part of the court's powers and in any event to be just and equitable.

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NA CASSIM
Acting Judge of the Labour Court

Date of hearing: 17 December 2008

Date of judgment: 17 December 2008

Date of editing: 08 January 2009

APPEARANCES

For the Applicant: Adv MA Lennox
Instructed by Moni Attorneys

For the Respondent: Mr Shigange from Shigange Attorneys