REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA82/2011

In the matter between:

PALACE ENGINEERING SERVICES (PTY)

LIMITED Appellant

(Respondent *a quo*)

and

PHASHA, MAFIHLE ERNEST Respondent

(Applicant *a quo*)

Heard: **22 November 2012**

Delivered: **21 February 2013**

Summary: Reinstatement of appeal- late filing of appeal due to late receipt of order granting leave to appeal- explanation reasonable- Prospects of success based on dismissal for operational requirement- employer failing to consult with employee- employer accepting procedural unfairness of dismissal- dismissal not preceded by a fair process may result in difficulties for an employer to show the substantive fairness of a dismissal - no alternative employment to retrenchment offered to employee- no reasonable prospects of success- application for the reinstatement of the appeal dismissed with costs.

Coram: Landman AJA, Waglay AJP and Zondi AJA (concurring)

JUDGMENT

LANDMAN AJA

Introduction

[1] Palace Engineering Services (Pty) Ltd, the appellant, seeks to appeal against a judgment of the Labour Court (Bhoola J) handed down on 1 July 2011 in terms of which the learned judge held that, Mafihle Ernest Phasha, the respondent, was unfairly retrenched and ordered his reinstatement. The appeal is with leave of the court *a quo*.

Reinstatement of the appeal

[2] The appeal had lapsed and an application to reinstate the appealed was filed. The application was opposed. Unfortunately, Mr Jackson, who appeared on behalf of the appellant, had not been briefed with a copy of this application and consequently he was not able to argue it. We decided to hear the merits of the appeal and to consider the condonation application in the light of the merits and the papers filed.

[3] The appellant's attorney has set out in detail the difficulties which caused the record to be filed out of time. It is clear that the appellant kept the respondent's attorney informed of all the developments. The late delivery of the record was occasioned by the late receipt of the order granting leave to appeal by the appellant and its attorneys. The preparation of the record was hindered by the intervention of the Christmas and New Year break and more so by the difficulties encountered by the typists employed by iAfrica, the transcribers, in locating all the documents required to be inserted in the record. The explanation is acceptable.

[4] The success of the application however turns on the prospects of success. It is to that that I turn.

The facts

[5] The relevant facts can be summarised as follows:

(a) The respondent was employed by ERWAT prior to his employment as Project Manager/Engineer (Projects) with Palace Engineering Services (Pty) Ltd on 1 July 2006.

(b) On 28 June 2007, the parties signed a fixed term contract which would expire on 31 March 2010. On 25 July 2008, the respondent and other employees became employees of the appellant. The respondent's contract expired on 31 March 2010 but was tacitly extended.

(c) On 24 May 2010, Mr Alf Hare provided the respondent with two notices. One was a notice of retrenchment. This notice was dated 20 May and stated that he was retrenched with effect from 1 June 2010 with his last working day being 31 July. The second notice was entitled "Notice of Intended Staff Retrenchments 20 May 2010". That afternoon the respondent was given a further notice. This notice stated that his last working day would be 30 June 2010.

(d) The respondent was dismissed. Conciliation was unsuccessful and the respondent applied to the court *a quo* for relief.

Admissions

[6] Prior to the trial, the appellant conceded that the respondent's dismissal, for operational requirements, was procedurally unfair and delivered a written offer to settle the respondent's claim in terms of Rule 34 of the Uniform Rules of Court. The appellant maintained that the respondent's dismissal for operational requirements was substantively fair.

The appellant's contentions

[7] The thrust of the appeal is that:

(a) the court *a quo* should have found that the respondent's dismissal for operational requirements was substantively fair; alternatively

(b) the reinstatement of the respondent into the appellant's employ was neither a just nor a practicable order.

(c) Having regard to the appellant's concession regarding the procedural unfairness of respondent's dismissal, the court *a quo* should have had regard to the offer to settle in terms of High Court Rule 34 and, if satisfied with it, should not have ordered costs against the appellant.

[8] Mr Jackson pointed out that Mr Alf Hare, the former Divisional Executive, gave evidence regarding the appellant's parlous financial state at the time of the respondent's retrenchment. From 1 April 2009 to 31 March 2010 a net loss of R2 582 677.56 was recorded by the company. In the following financial year the appellant's net loss expanded dramatically to R5 745 413. The respondent stated that he was not placed in a position to dispute this. The respondent admitted that months prior to his retrenchment he was aware of the appellant's cash flow problems.

[9] Mr Jackson developed these submissions further but, as I am prepared to accept that the appellant was in financial difficulties, I need not set them out.

[10] Mr Jackson submitted that Mr Hare's testimony that the appellant could not accommodate the respondent because he was not a registered engineer should have been upheld. Mr Hare testified that there were two new vacancies (February and June 2010) for appellant's Port Elizabeth office arising out of recent resignations. These positions required professional engineers registered with the Engineering Council of South Africa and that at the time the respondent was not a registered engineer. This also applied to the post advertised in June 2011 for a professionally registered electrical engineer in East London.

[11] Mr Jackson submitted that the respondent could not have been accommodated in several building projects which the appellant was allegedly involved in at the time of his retrenchment. He challenged the respondent's evidence on the following basis:

(a) The respondent was a specialist in water affairs, whether that be potable or waste water. Indeed, most of Respondent's qualifications are also in water affairs.

(b) It was never suggested to Mr Hare that as an alternative to retrenchment, the respondent could have been moved to one of many building projects which were allegedly available in the company at the time.

(c) Respondent’s version that he could be placed on a building project only appeared during the respondent's examination in chief for the first time and appears to be a recent fabrication or an afterthought at best.

(d) During the months preceding the respondent's retrenchment he did not even once suggest to Mr Hare that if there were no new water programs in the pipeline, he could be employed on a building project.

(e) The probabilities accordingly suggest that there was no alternative work for respondent in the building division or any other division of the appellant’s company. No new projects had been secured by the appellant.

[12] Mr Jackson also submitted that one final determinant regarding the probabilities of whether the respondent's dismissal was substantively fair is whether in the months preceding his retrenchment, the respondent was not performing any work or simply studying in his office or playing computer games. This submission rested upon:

(a) The evidence of Mr Hare that in the six months prior to respondent's retrenchment, the respondent was not a busy man at all and on several occasions Mr Hare had walked into his office to find the respondent studying or playing computer games.

(b) It was not put to Mr Hare that the respondent would deny having studied and played computer games during office hours. Rather there

was simply a question put to Mr Hare to the effect that "Do you expect this Court to believe that?"

(c) The respondent failed to adduce any evidence during his examination-in-chief to deny that he had partaken in these activities.

(d) The respondent, in the two years that he worked under Mr Hare, always viewed Mr Hare as an honest man.

Evaluation

Financial situation

[13] The respondent suggested, for the reasons referred to in his evidence, that the appellant's financial position was not as perilous as Hare testified. However, I am prepared to accept that the appellant was in financial distress which worsened. This brings me to the nub of the case. Was the dismissal of the respondent substantively fair? The *onus* rested on the appellant to show that it was. In the case of a proposed retrenchment for operational reasons the purpose of procedural fairness is to ensure that the dismissal is substantively fair. When a dismissal is not preceded by a fair process, as in this case, it may be extremely difficult, although not impossible, for an employer to show that a dismissal was substantively fair. See *Kotze v Rebel Discount Liquor Group (Pty) Ltd* (2000) 21 ILJ 129 (LAC) at para 1371.

[14] The appellant's difficulty is compounded by what can charitably be described as the misleading version in the pleadings that there were "extensive consultations" with the respondent prior to his retrenchment. This misrepresentation was conceded at the last moment. The letters addressed to the respondent which sought to convey the impression of consultation also add to the appellant's problems.

[15] Had the appellant's representatives consulted with the respondent, he would have told them what was on record, that he had qualifications and experience in waste water. Instead Hare proceeded from the incorrect premise that the respondent's expertise lay only in potable water. If Hare sought alternative

employment for the respondent, it follows that he would have looked in the wrong area. Although no new water projects had been recently obtained Mr Hare conceded that there were existing water projects and two new water projects were possibly in the pipeline.

[16] Hare also proceeded from the premise that the respondent had no knowledge and experience in building management and building service projects. Hare did not explore the possibility of an alternative position in such projects. Once more had Hare consulted with the respondent he would have been made aware that the respondent had experience on building services projects. The respondent was in fact in charge of building services projects for the appellant when he was promoted to the position of Engineering Manager: Mechanical (HOD).

[17] Mr Jackson submitted that it was only during the respondent's examination-in-chief that he, for the first time, suggested that he had experience in building projects. Mr Jackson also submitted that during the months preceding the respondent's retrenchment he did not suggest to Mr Hare that if there were no new water projects in the pipeline, he could be employed in a building capacity. In the end Mr Jackson submitted the respondent's evidence on this score appears to be a recent fabrication or an afterthought at best.

[18] The respondent was only advised on 20 May that he had been selected for retrenchment and that he was to be dismissed. The respondent was not consulted prior to his retrenchment. As he did not know that he was in the firing line, so to speak, he would not have had any reason to explore alternative posts within the organisation. His skills as regards building projects can hardly be a fabrication or afterthought. The appellant initially employed him on account of these skills. The respondent's contract of employment clearly states in annexure "A" that the respondent's task directives were to include, *inter alia*, "Leading, training and assisting a team of mechanical technical technicians in building services..."

[19] The respondent was unaware that other employees were being retrenched until the trial commenced. The most that can be said is that the respondent was aware that the appellant was experiencing a cash flow problem.

[20] Mr Hare was not aware whether there was work for the respondent to do in other divisions which had once been part of his responsibilities. Hare testified that someone else had taken over the responsibility for projects related to waste water. The new Divisional Executive responsible for such projects did not testify.

[21] I am not convinced that the respondent was kept fully occupied during the six months prior to his dismissal. Mr Hare's evidence that on several occasions he had walked into his office to find the respondent studying or playing computer games made an impression on him. Mr Hare was irked by what he found. But the *onus* rested on the appellant to show that objectively there was no work for the respondent to do and that no work could reasonably be found for him to do.

[22] Something was made of the respondent's inability to register with the council as a technologist but it does not relate to the reasons for his dismissal.

Reinstatement inappropriate?

[23] Mr Jackson made the following submissions regarding the order of reinstatement of the respondent with retrospective effect:

(a) It was common cause at the hearing of the trial that the Respondent's position had not been filled at all subsequent to his retrenchment.

(b) Even in the financial year post-Respondent's retrenchment, the Appellant was still making massive financial losses.

(c) Mr Hare's evidence was that the respondent, if reinstated, would simply sit around again doing nothing.

[24] In granting the relief of reinstatement, the court *a quo* reasoned as follows:

'...The applicant seeks reinstatement. He was employed by the respondent for four years and testified that he was unemployed for five months and struggled to find work after his retrenchment. He has since been employed at ERWAT again but at a significantly reduced salary. The respondent submitted that this was confirmation of the impact of the global downturn in the engineering consulting industry, and that it was provided in section 193(2)(c) to order his reinstatement. However no evidence was led in this regard and in the context of Hare's admission that he was not aware of business plans for the restructured division into which the applicant would in all likelihood fit, there is no reason why reinstatement should not be ordered. The Applicant also purchased a house close to his office when he was offered employment with the respondent and had a new baby when he was retrenched. He received some UIF income but was mainly reliant on his wife .for support. Given the undisputed evidence of the applicant that there was available work in waste water and that he had experience in building service projects, there is no reason why it would not be reasonably practicable, for the respondent to reinstate him... '.

[25] Reinstatement is the primary remedy to be afforded to an employee who has been unfairly dismissed. No consultation had taken place with the respondent. Mr Hare was defending the appellant's stance in the witness box; not endeavouring to find a solution as the Labour Relations Act 66 of 1995 requires. It is appropriate that this procedure be conducted properly. It cannot be said that there are no prospects of a position being found for the respondent. If there is nothing to be done the appellant may well retrench him after following the proper procedure.

Reinstatement and mitigation of loss

[26] The respondent was dismissed on 30 June 2010. The respondent remained unemployed for some five months. He had financial responsibilities. He relied on UIF. He was able to obtain a position at ERWAT as from December 2010. He earned half the salary which he had been paid while employed by the appellant. At the time of his trial he was still paying off what he said was a large bank overdraft.

[27] Mr Jackson contended that the order of reinstatement, made by the court *a quo*, does not take into account the unfair advantage which respondent would gain in circumstances where for the period he was re-employed at ERWAT (from December 2010 onwards). It was further submitted that the respondent would, by his own admission, receive double pay.

[28] Mr Vuyo submitted that the respondent was not unfairly advantaged by the order of reinstatement. The respondent testified on the challenges he had to endure after being unfairly retrenched. It could not have been expected of the respondent to simply wait for the outcome of this particular case. He had to secure employment to make ends meet. It is submitted that this complaint is devoid of substance.

[29] Mr Jackson did not develop his submission that the respondent was under a duty to mitigate his loss or to reduce the appellant's burden, by seeking employment. His submission is that something less than full reinstatement should be ordered and that the degree of reinstatement should be reduced by an amount or a rebate taking into account what the respondent has earned in the interim.

[30] The common law concept of specific performance approximates to the concept of statutory reinstatement. In *Toerien v University of Stellenbosch* (1996) 17 ILJ 56 (C), followed in *Davids v Boland Rugby (Pty) Ltd* (C12/10) [2011] ZALCCT 35 (5 September 2011), it was held by Traverso J (as she then was) that where an employee claimed specific performance for his unlawful termination of employment the employer was not entitled to deduct amounts the employee earned from other sources. I am of the view that the common law position referred to in the *Toerien* judgment applies to statutory reinstatement.

Costs in the court *a quo*

[31] Mr Jackson submitted that having regard to the appellant's concession regarding the procedural unfairness of respondent's dismissal, the court *a quo* should, it is submitted, have had regard to the offer to settle in terms of High

Court Rule 34 and, if satisfied with same, should not have ordered costs against the appellant.

[32] The purpose of a tender in terms of Rule 34 is to possibly protect a litigant in the event that the other side is awarded judgment in a lesser amount than the amount set out in the tender. The court would not normally know that there was a tender much less know of the contents of the tender. However, Bhoola J was informed by Mr Jackson that a tender had been made although she was not told about the contents of the appellant's tender. Once judgment was given it was for the appellant to bring the contents of the notice to the court's attention, through the registrar, for court to consider the question of costs afresh. This was not done but the appellant seeks to challenge the cost order on the basis of that tender. No information has been placed before us as to the contents of the tender.

[33] Moreover, this Court cannot consider the matter on the basis of the tender because no order, as regards the costs in relation to the tender, has been made by the court *a quo*. If this Court were to consider the issue, this Court would be assuming a function of the court *a quo* without that court having first exercised its discretion. This simply cannot be done.

[34] No other complaint has been lodged about the order of costs by the court *a quo*.

Costs of appeal

[35] The respondent seeks a special order of costs of the appeal against the appellant. He does so on the basis that:

(a) The appellant put forward a fabricated defence to the effect that there were "extensive consultations" with the respondent prior to his retrenchment and it was only when the trial commenced that this was retracted and the procedural unfairness of the respondent's dismissal was conceded.

(b) In this appeal, the appellant still persists with its unwarranted and baseless attacks on the judgment and reasoning of the court *a quo* and more importantly the appellant continued in the appeal to argue that respondent's suggestion that he had experience in the building projects was a fabrication, when appellant had head-hunted the respondent to work in its building projects and the respondent had in fact worked in the appellant's building projects until he was promoted.

(c) The appellant is simply appealing in order to delay having to reinstate the respondent and pay him his back-pay "which is way over R1 million".

[36] There is no cross–appeal against the cost order made by the court *a quo*. Therefore the first ground cannot stand alone. It is true that the appeal is to be dismissed but I am of the view that, having regard to the fact that costs do not automatically follow the result in this Court, costs should be awarded on the ordinary scale.

[37] It follows that as there are no reasonable prospects of success the application for the reinstatement of the appeal cannot succeed.

Order

[38] In the premises:

1. The application for reinstatement of the appeal is dismissed with costs.

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A A Landman AJA

I agree

_____

B Waglay AJP

I agree

_____

D H Zondi AJA

APPEARANCES:

FOR THE APPELLANT: Adv B M Jackson

Instructed by Fullard Meyer Morrison INC

FOR THE RESPONDENT: Ndumiso Voyi INC