REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

REPORTABLE

CASE NO: JA63/11

In the matter between:-

SOLIDARITY obo JA WEHNCKE Appellant

and

SURF4CARS (PTY) LTD Respondent

Delivered: 20 February 2014

Flynote : Automatically unfair dismissal – Dismissal to compel employee to accept demand (section 187 (1) (c) of LRA 1995) – Difference between such dismissal and dismissal defined in section 186 – Test whether dismissal conditional or irreversible – Dismissal based on Employee's refusal to accept a contract of employment embodying a term which is necessary for employer's operational requirements not automatically unfair.

JUDGMENT

LABOUR APPEAL COURT

ZONDI, AJA

Introduction

[1] This appeal, which is with leave of the Court *a quo*, is against the whole of the judgment and order handed down on 13 July 2011 by Lagrange J dismissing the appellant's automatically unfair dismissal claim as contemplated by section 187 (1) (c) of the Labour Relations Act 66 of 1995 (the LRA) and the learned judge's failure to consider the appellant's alternative claim of unfair dismissal. The basis of the Court ***a quo's*** decision was that the appellant had failed to satisfy it on a balance of probabilities that the purpose of his dismissal was to compel him to sign a contract incorporating a term which the appellant alleged sought to amend the terms of his employment.

[2] The crisp questions for determination are whether the allegations contained in the appellant's statement of case read with the averments in the affidavit in support of a default judgment are sufficient to found the appellant's claim of automatically unfair dismissal as contemplated by section 187 (1) (c) or for that matter, an alternative claim for unfair dismissal and whether the Court *a quo* had jurisdiction to consider the alternative claim for unfair dismissal falling within the ambit of section 188 (1) of the LRA[1].

LABOUR APPEAL COURT

[1] *(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove-*
(a) that the reason for dismissal is a fair reason-
(i) related to the employee's conduct or capacity; or
(ii) based on the employer's operational requirements; and
(b) that the dismissal was effected in accordance with a fair procedure.

Facts

[3] It is common cause that the appellant was employed by the respondent as a Data Capturer/Photographer in terms of a verbal agreement he concluded with the respondent in or about October 2007. Part of his duties included marketing the respondent's brand which involved travelling to the respondent's clients and for that purpose the respondent provided the appellant with a company vehicle branded with its logo. According to the appellant when the motor vehicle was made available to him for his use the respondent did not impose any restrictions on its use and in particular that he would be required to pay the excess amount should the vehicle be involved in a collision.

[4] On or about 3 March 2008 the respondent presented to the appellant a written agreement embodying the terms which the respondent proposed were to govern their employment relationship and by which the respondent sought to regulate the use of its vehicle by the appellant.

[5] One of the terms of the contract required of the appellant to undertake that he would be responsible for the payment of the excess amount should the respondent's vehicle be involved in a collision. The appellant strongly objected to the inclusion of this term in the contract of employment on the basis that it was "*too vague*". The appellant requested the respondent to remove the relevant offending term from the contract but the latter refused. The appellant refused to

LABOUR APPEAL COURT

sign the contract unless the offending term was removed. The respondent responded by giving him an ultimatum to sign the contract on or before 28 April 2008 or else face dismissal. The appellant ignored the ultimatum and refused to sign the contract. His refusal to comply with the ultimatum prompted the respondent to terminate the appellant's service by giving him one month's notice in a letter dated 2 June 2008.

[6] The letter reads thus:

EMPLOYMENT CONTRACT: USE OF COMPANY MOTOR VEHICLE

1. Your letter dated 29 April 2008 refers.

2. During February 2008 we issued the Companies Employment Contract containing the Terms and Conditions of Employment and the use of a company car for your acceptance and signature.

3. Notwithstanding (sic) several requests on numerous occasions, as noted on meeting agendas, that you acknowledge the terms and conditions and return the contract, you purposely delayed accepting and returning the contract to Surf4Car. To date we have not received the signed contract from you.

LABOUR APPEAL COURT

4. *It is company policy that company motor vehicles can not be used by employees whether on probation or not without acceptance of the terms and conditions for the use thereof.*

5. *Surf4Car can not allow the further use of its motor vehicle by you and Head Office instructed that you return the Company Ford KA registration number (TWK 878 GP) with immediate effect (02 June 2008) before 12h00 to Surf4Car, Wingate Glen, Rubenstein Road 701, Moreleta Park, Pretoria.*

6. *You are aware, that due to the marketing aspect of the work, it is imperative that duties are performed with a Surf4Car branded car and that you will not be able to execute your duties as expected.*

7. *Hereby, Surf4Cars gives you a one month's written notice, whereby you can use your own vehicle to conclude your duties. Your last day at Surf4Cars will then be Monday 30 June 2008."*

Proceedings in the Court *a quo*

[7] The appellant referred the dispute to the Court a quo alleging that the respondent's decision to terminate his services constituted an automatically unfair dismissal as envisaged by section 187 (1) (c) of the LRA in that the purpose of the dismissal was to compel him to accept the contract of employment incorporating

LABOUR APPEAL COURT

the term to which he objected. As relief the appellant sought an order declaring that his dismissal constituted an automatically unfair dismissal as envisaged by section 187 (1) (c) and ordering the respondent to pay him the maximum amount of compensation provided for by the LRA. In the alternative he sought an order declaring that his dismissal was substantively and procedurally unfair. The allegations underlying the appellant's alternative claim were, however, not pleaded in the appellant's statement of claim.

[8] The respondent did not oppose the matter and upon the expiry of the time provided for the filing of a statement of defence the appellant, as he was entitled, set the matter down for default judgment.

[9] In the affidavit which he filed in support of the request for default judgment the appellant sought *inter alia* an order in the following terms:

> *"5.1 **ORDER** that the Applicant's dismissal amounted to an automatically unfair dismissal as envisaged by section 187 (1) (c), ordering the Respondent to pay the maximum amount of compensation provided for by the Act, alternatively that should the Honourable Court find that the dismissal was not automatically unfair find the dismissal to be substantially and procedurally unfair and award compensation*."

[10] The Court *a quo* in determining the issues before it followed the approach as set out by this Court and the Supreme Court of Appeal (the SCA) in *National*

LABOUR APPEAL COURT

Union of Metalworkers of SA and Others v Fry's Metals (Pty) Ltd (2005) 26 ILJ 689 (SCA) and *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA* (2003) 24 ILJ 133 (LAC) in which cases the meaning of automatically unfair dismissal was considered. It held that in order to succeed in his claim based on section 187 (1) (c) the appellant had to demonstrate on a balance of probabilities that the respondent was threatening him with dismissal in order to get him to accept a new term of employment (the condition attached to the use of the respondent's vehicle).

[11] The Court *a quo* found that the appellant's own initial written response to the request to sign the contract of employment did not suggest that his problem was that the respondent was imposing a new term which had not previously been agreed upon. It further found that the appellant's description of the conditions of the company car usage tended to support the interpretation that it was already part of existing company policy and not an amendment of it. And finally it found that even if the conditions attaching to company car usage had amounted to an alteration of the appellant's orally agreed terms of employment, his dismissal was not conditional in the narrow sense meant by the SCA in *Fry's Metals supra*. It reasoned that there was nothing in the appellant's statement of case, as confirmed on affidavit, which demonstrated that the respondent made it clear that the appellant would be reinstated if he signed the contract.

LABOUR APPEAL COURT

[12] The Court *a quo* concluded that the appellant had failed to demonstrate that the reason for his dismissal was to compel him to comply with a demand to amend his term of employment. It held accordingly that the reason for the appellant's dismissal was not automatically unfair in terms of section 187 (1) (c) and dismissed the appellant's claim with no order as to costs.

The appellant's case

[13] The findings and conclusions of the Court *a quo* were challenged by the appellant on various grounds. There are, however, two main bases upon which the appellant's attack on the Court *a quo*'s judgment is based. First, he contends that the Court *a quo* erred in finding that the appellant's evidence in support of his claim under section 187 (1) (c) was insufficient. His second leg of attack relates to the Court ***a quo's*** failure to consider his alternative claim.

[14] In relation to the second ground the Court *a quo* in granting leave to appeal conceded that it had in error, not considered the appellant's alternative claim in the judgment. It, however, pointed out that the Labour Court does not have automatic right to determine a dispute over a substantively and procedurally unfair dismissal, and may only do so with the agreement of the parties in terms of section 158 (2) (b)[2] which procedure was not available to it in view of the fact that

[2] *(2) If at any stage after a dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the Court may-*
(a) ...

LABOUR APPEAL COURT

the matter was before it for the purposes of granting a default judgment and that had it considered the appellant's alternative claim an appropriate course available to it would have been to remit the matter to an appropriate forum for arbitration in terms of section 158 (2) of the LRA.

Applicable Law

[15] The appellant's main claim is founded on section 187 (1) (c) of the LRA which deals with automatically unfair dismissals. The section provides as follows:

> *"(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is-*
>
> *(a) ...*
>
> *(c) to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee..."*

[16] It is common cause that what led to the termination of the appellant's employment was his refusal to sign a contract of employment which contained a term to which he objected. The term of the contract to which the appellant objected is the following:

(b) with the consent of the parties and if it is expedient to do so, continue with the proceedings with the Court sitting as an arbitrator, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make."

LABOUR APPEAL COURT

"*I must advise you that should you have any accident in the vehicle, you will be responsible for the excess amount*."

[17] The appellant made it clear to the respondent that he was not prepared to sign the contract unless the clause which he considered offensive was removed. The parties deadlocked on the exclusion from the contract of the term to which the appellant objected and in consequence the respondent on 2 June 2008 terminated the appellant's services by giving him a month's notice.

[18] The first question posed in para 2 hereof should be determined within the prism of the broader jurisprudence of this Court. As indicated earlier in this judgment in *Fry's Metals supra* this Court and the SCA considered the meaning of dismissal which is contemplated by section 187 (1) (c). The SCA held that a dismissal would be automatically unfair when such dismissal is effected for the purposes of compelling the employee to agree to the employer's demand and such dismissal is temporary, pending the acceptance of the changes to the terms and conditions of employment.

[19] In the *Fry's Metals* case *supra* Zondo JP observed that there is a difference between a dismissal as defined in section 186 (a) and a dismissal as contemplated by section 187 (1) (c) and that these two categories do not overlap. In this regard he had this to say at para 31 of the judgment:

LABOUR APPEAL COURT

"[31] A dismissal for operational requirements fits comfortably within the definition of 'dismissal' in s 186(a) of the Act. There may be an argument that a dismissal contemplated by s 187(1)(c) - especially if it is understood not to be final - does not fit comfortably within the definition of 'dismissal' in s 186(a). This argument would be based on the notion that the word 'dismissal' as defined in s 186 does not refer to a dismissal that is not final and that, wherever it appears in the Act, it bears the meaning given to it in s 186. The argument would be that to hold that the dismissal that is contemplated in s 187(1)(c) is not a final dismissal is to give the word 'dismissal' in s 187(1)(c) a meaning that is different from the meaning given to that word in s 186(a). In my view the difference between a dismissal as defined in s 186 and a dismissal such as is contemplated by s 187(1)(c) is that the latter dismissal is required to be effected for the specific purpose given in s 187(1)(c) and that purpose is absent in an ordinary dismissal such as is defined in s 186(a). That purpose renders a s 187(1)(c) dismissal a special kind of dismissal. In the light of all the above I conclude that there is a distinction between a dismissal for a reason based on operational requirements and a dismissal the purpose of which is to compel an employee or employees to accept a demand in respect of a matter of mutual interest between employer and employee. The distinction relates to whether the dismissal is effected in order to compel the employees to agree to the employer's demand which would result in the dismissal being withdrawn and the employees being retained if they accept the demand or

LABOUR APPEAL COURT

whether it is effected finally so that, in a case such as this one, the employer may replace the employees permanently with employees who are prepared to work under the terms and conditions that meet the employer's requirements. An ordinary retrenchment, where the employees who are being retrenched will not be replaced, is, of course, also a dismissal for operational requirements."

[20] This approach makes it clear that only conditional dismissals can fall under section 187 (1) (c) and in the words of the SCA in *Fry's Metals* at para 56 "*it is this that distinguishes them from the broader category of dismissals where the employer – irreversibly – has terminated the employment contract*".

[21] Turning to the facts of the instant matter in my view the appellant's contention that his dismissal was automatically unfair should be rejected. The dismissal was not conditional in the sense that it was reversible on acceptance of the respondent's demand to sign the contract incorporating the term to which the appellant had objected and which according to the appellant would have introduced changes to the terms of the verbal contract of employment. The respondent's letter notifying the appellant of termination of his services unambiguously makes it clear that his last day of work was 30 June 2008. That date was final and irreversible. In the termination notice the respondent advises the appellant that during the notice period the appellant should use his own motor

LABOUR APPEAL COURT

vehicle to perform his duties. It was unreasonable for the appellant to refuse to accept the respondent's offer of employment on the basis of the terms as set out in the contract of employment. The term to which the appellant objected was in my view necessary for the respondent's business requirements and probably formed part of the respondent's policy which applied to all of its employees who used its vehicles in the performance of their duties.

[22] During argument it was suggested by Mr **Van Der Bijl**, who appeared for the appellant, that the respondent in requiring the appellant to sign a contract embodying the term in terms of which he could be held liable for the excess should the vehicle be involved in a collision, discriminated against him because his fellow employees who also used the respondent's vehicles were not required to sign a contract with a similar term. This suggestion must be rejected because the case which it sought to advance was not pleaded in the appellant's statement of case nor in the affidavit he filed in support of the request for default judgment. (*Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others* (2010) 31 ILJ 273 (CC) at para 35)

[23] The second question is whether the Court *a quo* erred in not addressing the appellant's alternative claim relating to an unfair dismissal dispute. The allegations forming the basis of the appellant's alternative claim have not been pleaded at all by the appellant. The alternative claim is introduced for the first time in the appellant's prayers. Notwithstanding the lack of averments underlying the

LABOUR APPEAL COURT

appellant's alternative claim, I will, however, assume in his favour that it is cognisable in his statement of case and proceed to deal with the appellant's contention on the basis of that assumption.

[24] The question is whether the Court *a quo* had jurisdiction to adjudicate the dispute which concerns a claim for unfair dismissal. The appellant's alternative claim is a misconduct-based dismissal which ordinarily falls within the ambit of section 191 (5) (a) (i) of the LRA. In general the Labour Court does not have jurisdiction to adjudicate disputes concerning dismissals for misconduct, incapacity or other causes falling within the jurisdiction of the CCMA unless the CCMA director has, in terms of section 191 (6) of the LRA, decided upon application by any party to the dispute that it would be appropriate for the dispute to be referred to the Labour Court. And it may not in the exercise of its inherent discretion assume jurisdiction which is contrary to any statutory provision. It also has no jurisdiction to adjudicate a dispute which the LRA requires to be arbitrated. Accordingly if the Labour Court discovers that the dispute which has been referred to it for adjudication is the one which the LRA requires to be arbitrated, it may, however, stay the proceedings and refer the dispute to arbitration, or if, in terms of section 158 (2) and (3)[3] the parties consent and it is expedient to do so, assume the role of the arbitrator.

LABOUR APPEAL COURT

[3] *(2) If at any stage after a dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the Court may-*

(a) stay the proceedings and refer the dispute to arbitration; or

[25] In light of the above analysis I agree with the appellant that the Court *a quo* erred in failing to consider the appellant's alternative claim for ordinary unfair dismissal. It should have dealt with and finalised it in accordance with the procedure as set out in section 158. In my view a referral of the appellant's alternative claim to the CCMA for arbitration would have been an appropriate course for the Court *a quo* to have followed bearing in mind that the jurisdictional facts necessary for the exercise of its powers under section 158 (2) (b) were lacking as the proceedings before it were in the context of a default judgment.

[26] In these circumstances the appellant's appeal against the Court *a quo's* failure to consider his alternative claim should succeed and the appellant's claim relating to the unfair dismissal dispute should be referred to the CCMA for arbitration.

[27] In the result the following order is made:

1. The appeal relating to the appellant's claim for automatically unfair dismissal is dismissed;

LABOUR APPEAL COURT

(b) with the consent of the parties and if it is expedient to do so, continue with the proceedings with the Court sitting as an arbitrator, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make.

(3) The reference to 'arbitration' in subsection (2) must be interpreted to include arbitration-

(a) under the auspices of the Commission;
(b) under the auspices of an accredited council;
(c) under the auspices of an accredited agency;
(d) in accordance with a private dispute resolution procedure; or
(e) if the dispute is about the interpretation or application of a collective agreement.

2. The appellant's appeal against the Court *a quo's* failure to consider the appellant's alternative claim relating to the unfair dismissal dispute succeeds and the appellant's alternative claim is referred to the CCMA for arbitration.

3. no order is made as to costs.

_____

ZONDI, DH

WAGLAY, AJP & HLOPHE, AJA concur in the judgment of ZONDI AJA.

LABOUR APPEAL COURT

APPEARANCES

For the appellant : Mr A J van der Bijl

Instructed by : Solidarity

For the respondent : Adv. J M Bezuidenhout

Instructed by : Kramer Villion Norris Attorneys