REPUBLIC OF SOUTH AFRICA

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

CASE NO: JS 225/10

In the matter between:

MINISI, ROBERT GEORGE **Applicant**

and

PRODUCTIVE SYSTEMS (PTY) LTD **Respondent**

Heard: 16 May 2013

Delivered: 10 November 2014

Summary: (Alternative claims of dismissal for operational reasons and misconduct arising from two purported dismissals – s 186(a) and (e) – meaning of 'terminated with notice'.

JUDGMENT

LAGRANGE, J

Introduction

[1] The applicant in this matter, Mr R G Mnisi, alleged that he was unfairly dismissed for operational reasons, or alternatively unfairly dismissed for

misconduct on or about 29 October 2009. The respondent raised an *in limine* point which the parties had agreed would be argued at the trial hearing. At the commencement of trial proceedings, the parties agreed that the preliminary point could be disposed of on the basis of a stated case. During argument of the matter both parties were asked to submit written heads of argument on the relevance of the judgement in ***Manerweck v SEESA***[1] to the matter at hand, which they subsequently did.

[2] The *in limine* point concerned whether the dismissal of the applicant was for operational reasons or misconduct. The respondent alleges that the reason for his dismissal was misconduct, whereas the applicant contends it was for operational reasons. As there is no agreement for the Court to arbitrate the applicant's alternative claim of unfair dismissal for misconduct under s158(2)(b) of the Labour Relations Act, 66 of 1995 ('the LRA'),in the event that the applicant fails in his primary claim that he was unfairly dismissed for operational reasons, resolution of this question will determine whether the matter may proceed in the Labour Court.

The stated case

[3] The parties concluded a brief handwritten stated case, which is set out in full below:

> *"the parties agreed that the jurisdictional point in limine will be argued by way of a stated case.*
>
> *1. The applicant relies on the following chain of events which are common cause:*
>
> *1.1. On 6 October 2009 meeting was held where a notice of possible retrenchment was issued.*
>
> *1.2. Subsequent meetings were held on 9 and 19 October 2009.*

[1] **(2009) 30 ILJ 2745 (LC)**

1.3. On 22 October 2009 a letter of retrenchment was issued to the applicant.

1.4. On 29 October 2009 a certificate of service was issued to the applicant.

2. The respondent relies on the following chain of events which are common cause:

2.1. On 23 October 2009 applicant was absent without leave.

2.2. On 26 October 2009 the applicant received a notice to attend a disciplinary hearing.

2.3. On 28 October 2009 the hearing was held in the applicant's absence-he refused to attend.

2.4. On 29 October 2009 applicant was dismissed summarily.

3. The respondent brings a point in limine and contends that the honourable court does not have jurisdiction to adjudicate the dispute because the reason for dismissal is misconduct.

4. The applicant contends that the reason for that dismissal is operational reasons.

5. Honourable court is required to determine the jurisdictional challenge on argument and with reference to the pleadings and the bundle of documents."

[4] From the other common cause facts set out in the pre-trial minute, the following may be gleaned:

4.1 On 6 October 2009 the company convened a meeting with all employees including the applicant at which they were informed by the managing director that there was a possibility that some employees would be retrenched.

4.2 At the meeting the employees were also issued with a letter. Although the letter is not specifically identified in the pre-trial minute it could only be the letter dated 6 October 2009 which was entitled "SUBJECT: NOTIFICATION OF POSSIBLE RETRENCHMENT IN TERMS OF ANNEXURE A OF THE MAIN AGREEMENT OF THE

METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL AS WELL IS SECTION 189 (3) OF THE LABOUR RELATIONS ACT 66 OF 1995, AS AMENDED AND INTENTION TO CONSULT IN TERMS OF ANNEXURE A AND SECTION 189 (2) OF THE ACT". On the face of it, the letter was a detailed notice in compliance with section 189 (3) of the Labour Relations Act, 66 of 1995 ('the LRA'). At the end of the notice employees were advised of a meeting scheduled for 9 October 2009 at which they were requested to make any proposals for alternative suggestions to avoid retrenchment or any requests for assistance. They were also asked to prepare their written input on the issues in the notice and the possible retrenchment before the meeting.

4.3 The applicant attended meetings with the managing director on 9 and 19 October 2009.

4.4 The retrenchment letter dated 22 October 2009 stated that the applicant was to be dismissed for operational reasons and that the notice period would run from 31 October to 28 November 2009, but his last working day would be 30 October 2009.

4.5 On Monday, 23 October 2009, the applicant referred an unfair dismissal dispute to the CCMA, which is the same day the employer claimed he was absent without leave. That day he was issued with a letter containing two charges of misconduct concerning leaving work early and arriving late and being absent from work without authorisation.

4.6 The notice specified the disciplinary hearing date as 28 October 2009 and it is common cause that the applicant did not attend the hearing.

4.7 On 29 October 2009 he was called into meeting with the managing director and other management personnel and was given the notice of his summary dismissal.

4.8 When the conciliation took place at the MEIBC on 9 December 2009 the respondent's representatives argued that the applicant was dismissed for misconduct and not for operational reasons.

4.9 Nonetheless, the Commissioner stated on the certificate of outcome that the dismissal dispute did relate to operational requirements and stated that the matter could be referred to the Labour Court.

[5] The crisp issue in determining whether the applicant was dismissed for operational reasons or misconduct relates to whether or not he was entitled to treat the letter of 22 October as notice of his termination on 29 November 2009, or whether the respondent's purported summary dismissal of him for misconduct on 29 October terminated his employment.

[6] In *Marneweck* matter the pertinent facts were:

6.1 The employee had been warned for some time that if his sales team failed to make a certain financial target his team would be merged with another team and his position would become redundant.

6.2 He was notified early during June 2007 that his team was being phased in with another team and that, consequently his position was redundant, but he would be retained on his salary as a manager until the end of that month.

6.3 After that he had the option of remaining on as a consultant at the prevailing commission structure.

6.4 The employee took this as notice that he was being dismissed from his current position and that the offer to stay on in the capacity of a consultant was not a continuation of his employment as a salaried employee.

6.5 Consequently he referred an unfair dismissal dispute to the CCMA on 27 June 2007.

6.6 The matter was set down for conciliation-arbitration in late July 2007.

6.7 Before that hearing could take place, the employer charged the employee with desertion and purported to dismiss him for that reason prior to the conciliation-arbitration date.

[7] The Court found that in fact the employee had been already been constructively dismissed when he had been given the notice of his redundancy. While there are some obvious similarities between the

sequence of events in that matter and this one, the factual scenarios are not completely analogous. What is similar is that the employer took a step which the employee interpreted to be notice of their dismissal, and the employee referred an unfair dismissal dispute based on that step for conciliation prior to the date on which the employer claims it terminated the employment for reasons of misconduct. In *Marneweck* the learned Molahlehi J, concluded that on an assessment of the evidence, the employer terminated the employees service without notice when it notified him that he was redundant or soon thereafter.[2] The employer's purported dismissal of the employee the following month therefore occurred after the employment relationship had already ended.

[8] Where the analogy between that case and this one fails is that, in this instance, the applicant's employment had not yet ended when the disciplinary enquiry was convened and the employer purported to dismiss him summarily. The purported summary dismissal occurred on 29 October, whereas in terms of the notice issued to him that he was being dismissed for operational reasons, his dismissal would only take effect on 30 November 2009. Consequently, unlike Mr Marneweck, the applicant in this matter was still in the respondent's employment when he was charged and dismissed for misconduct before the notice period of his impending retrenchment had expired, or even begun.

[9] The respondent argued that the employer was entitled to withdraw the earlier notice of retrenchment when it decided to dismiss the applicant summarily. It contended that an employee's act of resignation is a unilateral act but where the notice period given by an employer has not yet commenced, as in this instance, it was entitled to withdraw the retrenchment notice.

[10] In ***SALSTAFF on behalf of Bezuidenhout v Metrorail (2)***[3], another matter which is relevant to this case, the learned arbitrator, J Grogan, dealt with a situation in which the employee had given notice of resignation, but was claiming he was constructively dismissed. Before the

[2] At 2753, para [40]

[3] **(2001) 22 ILJ 2531 (BCA)**

notice period expired the employer dismissed him summarily. The arbitrator had to determine if the employer's action had the effect of preventing the employee from relying on his earlier resignation on notice as the basis for pursuing his constructive dismissal claim. The arbitrator reasoned thus:

> *"[5] Subsection (a) of s 186 defines a dismissal as the termination of a contract of employment by an employer, with or without notice. The grievant's contract of employment was still in existence at the time it was terminated by the company, because he was still working out his notice period. The LRA provides that the time a 'dismissal' is deemed to have occurred is the earlier of the date on which the contract of employment terminated, or the date on which the employee left the service of the employer: s 190. The grievant was still in the service of the company when it I informed him on 22 January 2001 that he was dismissed. His prior resignation did not itself bring the contract to an end; it merely amounted to a notification that the grievant had chosen to terminate the contract in accordance with its terms. There can therefore be no doubt that a 'dismissal' in the sense contemplated in subsection (a) occurred on 22 January 2001. However, by resigning on 31 December 2000, the grievant gave notice that the contract would terminate on 31 January 2001.*
>
> *[6] Does this mean that the grievant is precluded from relying on a claim that he was 'constructively' dismissed? In my view, it does not. A resignation is a unilateral act by which an employee signifies that the contract will end at his election after the notice period stipulated in the contract or by law. While formally speaking, a contract of employment only ends on expiry of the notice period, the act of resignation, being a unilateral act which cannot be withdrawn without the consent of the employer (Du Toit v Sasko (Pty) Ltd(1999) 20 ILJ 1253 (LC)), is in fact the act which terminates the contract. Section 186(e) provides that a dismissal occurs when the employee 'terminated' a contract of employment, if the other condition in that section applies. Resignation has this*

> *effect. The mere fact that the employee is contractually obliged to work for the required notice period if the employer requires him to do so does not alter the legal consequences of the resignation. In my view, therefore, the fact that a 'dismissal' in the conventional sense occurs during the notice period after an employee's resignation does not preclude that employee from claiming that the termination of the contract by virtue of his earlier resignation amounts to a dismissal within the meaning of that term in s 186(e) - i.e. that he had no option but to resign 'because the employer had made continued employment intolerable'."*[4]

[11] If the respondent in this matter intended to argue that an employee's resignation is irrevocable, whereas an employer's notice of dismissal is not, I cannot agree. Both acts are unilateral and bring the employment relationship to an end, whether they are with or without notice. The only sense in which a dismissal or a resignation can be 'revoked' is if the other party agrees to the revival and continuation of the employment relationship, which necessarily means it cannot be done solely at the instance of the party that unilaterally ended it.

[12] On the approach in *Bezudenhout,* the question to ask is not whether the subsequent act of termination supercedes or replaces the first. Rather, it is whether the first act of termination constitutes a dismissal within the meaning of s 186 of the LRA, which an employee can then rely on to bring an unfair dismissal claim. In *Marneweck* the court did not have to deal with a similar situation because the judge found that the termination by the employer for redundancy had already taken effect. There was no notice period during which the 'second dismissal' took place.

[13] The issue here is, once a party has unilaterally brought the employment contract to an end by resignation or dismissal on notice, can either party during the notice period terminate the relationship earlier than the date which has already been unilaterally set by itself or the other party? From a contractual perspective, there seems to be no reason in principle why a summary termination cannot take place during a notice period, subject to

[4] At 2533-4.

grounds for summary termination arising. This is because the employment relationship only terminates when the notice period expires. Consequently, the mutual obligations of employer and employee to each other remain intact during the notice period. That being the case, if either part commits a fundamental breach of those obligations the party to whom they were owed is not without a remedy. They can still elect to hold the wrongdoer to their contractual obligations and insist that they perform them, or they can simply accept the breach as an act of repudiation of the contract and terminate the contract summarily, even though it was due to end a little while later at the end of the notice period. It should not matter either which party initiated the original termination on notice.

[14] On the interpretation in the *Bezuidenhout* award, the phrase "an employer has terminated…with…notice" in s 186(a) and the equivalent phrase "an employee terminated…with… notice" in s 186(e) mean that the act of giving notice of termination constitutes the termination itself, which entitles the employee to refer a claim of unfair dismissal to conciliation, even though contractually speaking, the employment relationship only terminates on expiry of the notice. In ***NULAW v Barnard NO & Another*** [5] the LAC, in considering the meaning of s 186(a). stated:

> *"The meaning of 'termination'*
>
> *[21] In analysing s 186(a) Brassey submits that s 186(a) means that an employee is dismissed only when the employer brings the contract of employment to an end in the manner recognized by the law. M S M Brassey Employment and Labour Law vol 3 at A8:8.*
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> *[22] With regard to the phrase 'with or without notice' Brassey writes as follows at A8:9:*
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> *'"With notice' has a slightly different connotation from "on notice': the latter makes the expiry of notice properly given the occasion for the termination, whereas the former signifies only that notice accompanies a termination and so leaves the basis of this dismissal unstated. It is unnecessary to consider which meaning*

[5] [2001] 9 BLLR 1002 (LAC)

the legislature intended. Under the sub-section the giving of notice is a matter of no consequence - what counts is whether the contract was legally terminated "with or without notice'. It was, it seems, included to make it clear that summary determination is embraced by the sub-section.'

[23] The key issue in the interpretation of the phrase 'an employer has terminated the contract of employment with or without notice' is whether the employer has engaged in an act which brings the contract of employment to an end in a manner recognized as valid by the law.

[24] In the present case the only dispute is whether the action in invoking the process of voluntary winding-up of the company which inevitably gives rise to the application of s 38 of the Insolvency Act in the case of a company being I unable to pay its debts constitutes an act of termination of the contract of employment. In terms of s 349 and s 350 of the Companies Act, once the resolution passed by the company has been registered, the voluntary winding-up commences. No further act is required to bring s 38 of the Insolvency Act into play.

[25] Analysed thus, the decision to pass the special resolution caused the contracts of employment to be terminated in that they were brought to an end by an action, being the decision to wind up and in a manner recognized as valid by law, that is in terms of s 38 of the Insolvency Act."[6]

(emphasis added)

[15] This interpretation of the use of the word 'termination' and the corresponding verb 'terminated' as well as the phrase 'has terminated' means that a termination, and consequently a dismissal in terms of s 186(1)(a) and (e) arises when the employer or employee, as the case may be, acts to bring about the end of the relationship in a manner recognised in law. The question this raises is does it matter, for the purpose of

[6] At 2296-7

determining if a dismissal has occurred, when the contract of employment actually ends?

[16] Section 190(1) of the LRA also recognises that the timing of the dismissal (the terminating action) and the date of dismissal can differ, because it defines the date of dismissal as follows:

> *"The date of* dismissal *is the earlier of –*
>
> *(a) the date on which the contract of employment terminated; or*
>
> *(b) the date on which the employee left the service of the employer."*

On the basis of the analysis above, an anomaly can arise in a case like this if the approach in *Bezuidenhout* is followed because it implies that a dismissal occurred under s 186(a) when the applicant was given the notice of retrenchment on 22 October 2009, even though his contract of employment did not terminate on 29 November 2009, the date specified in that notice. Instead, it ended on 29 October when he was summarily dismissed before the notice period had begun to run. On this definition, the dismissal date is determined in s 190(1)(a) with reference to the date when the contract itself terminates and not the date on which the employer or employee took the decisive step to bring it to an end. Consequently, following the approach in *Bezuidenhout* the act of dismissal as defined in s 186(1)(a) or (e) may precede the date of dismissal determined by s 190(1)(a).

[17] As it stands, this creates an unsatisfactory situation in which any summary termination by the employer party during the notice period based on an alleged repudiation of fundamental terms of the contract, would have no bearing on an unfair dismissal claim arising from the earlier termination with notice, even though the employment contract would actually expire on the date of summary dismissal, which is before the date it would have ended if notice period had been completed. So the unfair dismissal claim would relate to an act of termination by the employer which is not the same as the act which did end the contract. It would also mean that even though under the common law the summary termination would be

recognised as a valid way of terminating the employment contract and the date of termination and the reason for the termination would relate to the same action by the employer in ending the contract summarily, the date of dismissal for the purposes of an unfair dismissal claim would be determined by the summary dismissal, which is not recognised as the action causing the dismissal for the purposes of deciding if a dismissal occurred under s 186(a).

[18] On a closer consideration of *Barnard's* case, it is does not necessarily support an interpretation giving rise to the anomaly. In *Barnard*'s case the LAC was not considering a termination on notice but the effect of a voluntary liquidation on the employment relationship. It was not dealing with a situation of a dismissal on notice succeeded by a summary dismissal before the first dismissal had ended the contract of employment. Secondly, in this instance it was not the retrenchment letter which did end the contract of employment. Had the applicant worked until 30 October and then received pay *in lieu* of notice until 28 November, then the retrenchment notice would have brought the employment contract to an end on that date. However, we know the employment contract ended on 29 October and therefore the act of dismissal set out in the notice of retrenchment was not the one that actually brought the contract to an end. On this interpretation, the retrenchment notice therefore could not constitute a dismissal for the purposes of s 186(a). On this interpretation there can also be no anomaly between the dismissal which is attacked in the unfair dismissal claim and the date of dismissal determined by a later summary dismissal. The effect of this interpretation would also mean that the words 'with notice' in sections 186(a) should be interpreted as meaning the same as 'on notice' in the sense alluded to by the learned author Brassey MS, which the LAC cited. Consequently a dismissal on notice would be one in which the employment contract came to an end on the expiry of the notice period.

[19] Established principles of statutory interpretation also favour such an interpretation. Thus it is an interpretation which does not conflict with the common law principles determining how and when a contract of

employment is terminated.[7] Further it is an interpretation which avoids the absurdity of a dismissal which an employee wishes to challenge not necessarily being the dismissal which actually ended the contract of employment.[8]

[20] In relation to the matter at hand, I believe the correct interpretation of s 186(a) means that the employer's action in giving notice to the applicant of his retrenchment to take place on 28 November 2009 was not a dismissal within the meaning of the section because it did not bring his employment contract to an end. It was the subsequent summary dismissal on 29 October 2009, while he was still in employment that brought the employment contract to an end earlier than anticipated. Accordingly, this Court does not have jurisdiction to hear the applicant's claim of unfair dismissal for operational reasons.

[21] It is obvious that there was no consent given by the employer to hear the applicant's alternative claim of unfair dismissal so the court cannot consider that either. However, I am obliged to stay the proceedings in respect of that claim and refer the alternative claim to the CCMA to be determined by arbitration in terms of s 158(2)(a) of the LRA.[9]

Order

[22] In the circumstances, I find that the applicant's dismissal by the respondent was not for operational reasons, but for alleged misconduct and this Court does not have jurisdiction to hear his alternative claim for dismissal for reasons of misconduct.

[23] The applicant's referral of his claim for unfair dismissal for operational reasons is dismissed.

[24] Proceedings in respect of his alternative claim that he was unfairly dismissed for misconduct by the respondent are stayed in this Court and

[7] See e.g ***Ngqukumba v Minister of Safety And Security And Others*** **2014 (5) SA 112 (CC)** at 120-121, paras [17]-[18].

[8] See, e.g ***Mohunram And Another v National Director Of Public Prosecutions and Another (Law Review Project as*** *Amicus Curiae****)*** **2007 (4) SA 222 (CC)** at 245, para [54]

[9] See ***Solidarity obo Wehncke v Surf4Cars (Pty) Ltd*** **(JA63/11)** [2014] ZALAC 6 (20 February 2014).

that dispute is referred to the Commission for Conciliation, Mediation and Arbitration, which must set it down for an arbitration hearing.

[25] No order is made as to costs.

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R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: H R Liphosa

Instructed by: Wits Law Clinic

For the First Respondent: R Kuhn of Rudolf Kuhn Attorneys