IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

CASE NO D 345/97

DATE 1998/05/22

In the matter between:

KISSOPERSAD RUGNATH Applicant

and

TIMBER FREIGHT (PTY) LIMITED First Respondent
MB LOGISTICS (PTY) LIMITED Second Respondent

BEFORE THE HONOURABLE MR JUSTICE MASERUMULE

ON BEHALF OF APPLICANT: MR S GOVENDER

ON BEHALF OF RESPONDENT [NO APPEARANCE NOTED]

JUDGMENT DELIVERED ON: 17 September 1998

J U D G M E N T

MASERUMULE AJ:

[1] This is a matter between K Rugnath and Timber Freight (Pty) Limited, cited as the first respondent, and MB Logistics (Pty) Limited, cited as the second respondent.

[2] It is a referral in terms of section 191(5)(b)(ii) in terms of which the applicant seeks to have declared as unfair his retrenchment by the respondents.

[3] I should say from the outset that, although the applicant has cited Timber Freight (Pty) Limited as the first respondent, no order can be made against that respondent given the fact that the second respondent specifically advised the applicant that it had taken over the operations of the first respondent and,

therefore, became the employer of the applicant in terms of section 197 of the Labour Relations Act 66 of 1995.

[4] To the extent that an order was sought against the first respondent, the applicant's case is dismissed in that regard.

[5] As regards the relief sought against the second respondent, the facts are briefly as follows:

[6] The matter came before Court by way of default judgment, the respondent not having filed an answer to the applicant's statement of claim nor having appeared at court today when the matter was heard.

[7] The applicant gave evidence in support of his case. He also referred to various documents which were handed in at the commencement of proceedings. This evidence is summarised below.

[8] He was employed by the first respondent on 1 August 1990. He was offered 10% of the shares in the first respondent and was one of its three directors. The applicant was responsible for the Durban branch of the first respondent and managed it until his retrenchment in December 1997. According to the applicant, between 1990 and 1997, the first's respondent's turnover from its Durban operations increased from a few hundred thousand rands per month to in excess of two million rand per month .

[9] On 7 August 1997, the applicant met with two of the first applicant's directors, Messrs M. Bachman and H. Lourens at Durban International Airport. At this meeting, he was informed that the first respondent was being dissolved and its operations taken over by the second respondent. This was the first time that he became aware of the take-over as he was not consulted about it, although he was a shareholder and a director.

[10] Following the above meeting and in a letter to Mr Bachman dated 11 August 1997, the applicant expressed his concern about the take-over and the manner in which it was handled. He requested that he be advised in writing of, *inter alia*, the transition process, the terms of his employment by the second respondent and of job security. This letter was also signed by other employees in the Durban office.

2/2000 [11] Mr Bachman replied to the above letter on 12 August 1997 in which he stated, inter alia, that " this whole manoeuvre is to strengthen job positions for the people who are committed and dedicated, and perform." In

his reply to this letter dated 15 August 1997, the applicant stated that all he was asking for " is to be treated fairly" especially with regard to his 10% shareholding.

[12] The applicant testified that he got no response to his letter. Upset by the turn of events, he took leave from 18 August 1997 until 5 September 1997. He resumed his normal duties until end of September 1997 when he was informed by Mr Barker, a director of the second respondent, that he Mr Barker, had assumed control of the company and taken over the applicant's duties and responsibilities.

[13] On 26 September 1997, he referred a dispute to the Commission for Conciliation , Mediation and Arbitration (the "CCMA"), alleging an unfair labour practice with regard to the transfer of his contract of employment. The first respondent was cited as the employer and respondent in this referral.

[14] Following his referral of the above dispute to the CCMA, the applicant was telephonically contacted by a Mr Lennox, who questioned him about his referral of the alleged unfair labour practice to the CCMA. Mr Lennox instructed him to take a week's leave, which he did. It appears that Mr Lennox was the second applicant's labour consultant.

[15] The applicant returned to work on the 8 October 1997. He was called to a meeting by Mr Barker, at which he was also introduced to Mr Lennox. According to the applicant, Mr Lennox told him he was dismissed. However, the next day he was told to take leave and return on 10 October 1997.

[16] On 13 October 1997, he was instructed to talk to Mr Lennox on the telephone, in the presence of Mr Barker. Mr Lennox instructed him to write down disciplinary charges which were being instituted against him. The charges included alleged unauthorised use of a company vehicle and cheque and failure to comply with reasonable instructions. He was also instructed by Mr Lennox and Mr Barker to respond to the charges on the same day and to return to work on 15 October 1997. On that same day, his company car was also taken away from him. However, no disciplinary hearing took place in respect of these charges.

[17] When the applicant reported for work at 8h15 on 15 October 1997, he found that he had no office, desk or telephone. At about 11h00, he was told to go home by Mr Barker. The applicant wrote a letter to the first respondent on the same day, regarding the events of 13 October 1997 and of that day. He also requested that he be advised of what his position with the first respondent was. Also on the same day, the applicant's attorney's of

record sent a letter to the first respondent in which they, *inter alia,* requested clarity regarding the applicant's position.

[18] On 16 October 1997, the second respondent , through Mr Barker, addressed a letter to the applicant's attorneys. The letter stated that the second respondent had purchased the first respondent as a going concern and that the applicant was now in the second respondent's employ. The applicant's attorneys were also invited to attend a meeting with the second respondent, "in order to attempt to resolve the dispute".

[19] A meeting took place on 23 October 1997. The applicant was with his attorney, Mr Morgan, and the second respondent was represented by Mr Barker and Mr Lennox. According to a letter written by the applicant following this meeting, he was threatened with disciplinary action if he did not accept a severance package and resigned from the second respondent's employ.

[20] On 24 October 1997 the applicant was given a charge sheet in which he was charged, *inter alia,* with issuing a company cheque and refusing to obey instructions on 24 September 1997 and failing to perform duties on 18 September 1997. The applicant was once more instructed to respond on the same day but did not do so. He responded on 27 October 1997, and requested in his response, that the be paid R75 000,00 as severance pay and be given a Mazda motor vehicle. Again no disciplinary hearing took place in respect of these charges.

[21] On 28 October 1997 and following the meeting on 23 October 1997, the applicant was once more given a charge sheet with six charges. Some of the charges were the same as those of 13 October 1997, one related to 27 August 1997 and the other to 16 September 1997. The disciplinary hearing was to take place on 31 October 1997.

[22] The applicant attended a disciplinary hearing on 31 October 1997. Mr Barker and Mr Lennox attended the hearing. The applicant was unrepresented as his attorney was unable to attend. According to the applicant Mr Lennox told him he was "fired" but that the company had to go through with the hearing. After some discussions, he was sent out of the room where the "hearing" was being held. He was called back a while later and handed a letter signed by Mr Barker. The letter is headed "Contemplated Retrenchment" and the applicant is therein advised that "due to restructuring, the operational requirements of this establishment are of such a nature that your position is now redundant". The

letter goes on to say that consultations will take place on measures to avoid retrenchment, the timing of the dismissal, mitigation of the adverse effects thereof and severance pay. The letter also says that “should retrenchment be effected, this establishment will pay a severance package of one week’s wages per completed year of service.” Nothing further has been said about the disciplinary charges.

[23] On 4 and 6 November 1997, the applicant and his attorney attended meetings with the second respondent which was represented by Mr Barker and Mr Lennox. According to the minutes of the meeting of 6 November 1997, as prepared by the applicant’s attorney, the applicant was told that his position was redundant, an alternative position was that of switchboard operator at a salary of R900,00. When the applicant refused to accept his redundancy or the alternative position, he was told that he was dismissed with immediate effect. As the meeting progressed, he was told at various stages that he was in fact suspended.

[24] On the same day, 6 November 1997, the second respondent advised the applicant in a letter signed by Mr Barker, that :

23.1 His (the applicant’s) position was redundant ;

23.2 The second respondent had no alternative to retrenchment;
23.3 The second respondent would pay one week’s salary for each completed year of service;
23.4 The applicant’s attorney had stated that the entire consultation “was a farce” and the applicant’s position was not redundant and relevant formation was still required; and
23.5 The applicant should make submissions as to why he believed his position was not redundant.

[25] On 11 November 1997, an entity calling itself the Amalgamated Employers Association sent a letter to the applicant’s attorney in which applicant’s attorneys were threatened with a defamatory action in respect of the minutes of the meeting of 6 November 1997, a copy of which had been sent to the third respondent, unless the applicant’s attorneys submitted a written apology in respect of the contents thereof. This letter is signed by Lennox. Needless to say, no such apology was forthcoming from the applicant’s attorneys.

[26] In a letter dated 10 November 1997, addressed to the applicant’s attorneys, the second respondent instructed the applicant to report to work immediately, failing which he would be treated as a deserter. The applicant’s attorneys advised the second respondent in a letter dated 12 November 1997 that the applicant would return to work provided the second respondent confirmed certain facts set out therein. These included an allegation that the applicant had been dismissed and that he should be reinstated in his position with full benefits.

[27] The second respondent replied to the above letter on 13 November 1997.

The letter stated that the applicant :

26.1 had not been dismissed;

26.2 must report for work forthwith; and

26.3 services were no longer required and they had been taken over by Mr Barker and Mr Bachman in their capacity as shareholders and directors of the second respondent.

[28] Further correspondence followed between the second respondent and the applicant's attorneys. In one such correspondence, dated 11 December 1997, the applicant's attorneys required the second respondent to furnish reasons why the applicant's position was redundant. It was stated therein that , when the second respondent took over the first respondent's business, Mr Barker had stated that "he had no knowledge of shipping" as he came from a transport background and "would rely heavily on Mr Rugnath for the latter's knowledge and expertise in shipping". The letter also stated that 4 to 13 employees had since been employed and they (the applicant's attorneys) could not understand how the applicant's position could be said to be redundant.

[29] In its letter dated 11 December 1997, responding to the applicant's attorneys of the same date, the second respondent informed the applicant's attorneys that the applicant's services would be terminated on 15 December 1997 due to his redundancy and that he would be paid one week's wage for each completed year of service, in addition to two weeks wages in lieu of notice and pro rata leave pay.

[30] The second respondent indeed terminated the applicant's services on 17 December 1997 in accordance with its letter of 11 December 1997.

[31] On 29 December 1997, the applicant referred a dispute to the CCMA for arbitration. A number of issues were raised in the referral, including the alleged unfair transfer of employment contract, unfair redundancy without proper consultation and severance pay. The certificate of outcome refers in typed script to "unilateral change to terms and conditions of employment" but this is scratched out and replaced by "Retrenchment" and is signed by the Conciliating Commissioner. In addition, there is a letter addressed to the CCMA by the second respondent dated 10 February 1998, being the date of the conciliation meeting, in which it is stated that "the dispute was agreed to as being (a) retrenchment and compensation". In the premises, I am satisfied that the applicant properly referred his alleged unfair retrenchment dispute to the CCMA and that this is the real dispute between the parties which was not resolved.

[32] On the basis of the evidence presented at the hearing, including documentary evidence, I am satisfied that the applicant's retrenchment was not for a valid reason nor in compliance with a fair procedure.

[33] The evidence establishes that the first respondent sold its business as a going concern to the second respondent. This is confirmed by the second respondent in a number of letters. The applicant's contract of employment was, by virtue of section 197(1)(a) and (2) of the Act, transferred to the second respondent.

[34] The second respondent did its best to get rid of the applicant. Various charges were laid against him, but none were followed to finality by the second respondent. Instead, the second respondent chose to follow the redundancy route, and in this respect, it failed dismally in conforming to and complying with the requirements of section 189 of the Act. On the available evidence, the applicant's position was not redundant. He knew the business and had run it successfully for a number of years. On the uncontested evidence, Mr Barker did not even know the business for him to seek to assume the applicant's duties. It seems to me that the second respondent, together with Mr Barker, sought to rid themselves of the applicant by adopting very dubious means indeed. By not defending the applicant's claim, the second respondent left the applicant's version uncontested and I have no reason not to accept his evidence. In addition, the documentary evidence, including correspondence from the second respondent, leaves me in no doubt that having chosen to nail its colours to the mast by insisting that the applicant's position was redundant, the respondent had to satisfy me that the applicant's position was indeed redundant and that it consulted with him as required by section 189 of the Act. The evidence available to me points in one direction only, namely, that the applicant's position was not redundant and no proper consultations were held with him or his representative. The applicant's dismissal was, accordingly, not for a valid reason nor in accordance with a fair procedure, having regard to the provisions of section 189 of the Act.

RELIEF

[35] The applicant testified that he earned R6500,00 per month, plus the value of his company motor vehicle of R2500,00 per month, a R250,00 per month contribution toward medical aid as well as a thirteenth cheque of R500,00 per month. His total earnings were thus R9750,00 per month.

[36] Applicant also testified that he had no income for six months after his dismissal. He started his own business from which he earns between R3000,00 and R4000,00 per month. He testified that with the economy down, it will take a long time before he can earn sufficient income from his business to compensate for the loss of income from his job.

[37] The applicant has been poorly treated indeed. His treatment by the second respondent has been atrocious, insensitive and irrational. He has tried to mitigate his losses. In my view, and given the facts as set out in this judgement, the second respondent must take full responsibility for the applicant's present position.

[38] The applicant does not seek reinstatement, to which on the facts, he is entitled to. He seeks compensation. In deciding on what compensation is just and equitable, I must take into account the provisions of section 197(2) of the Act. His evidence on what he has done to mitigate his losses is unchallenged. Further, he has not found a comparable source of income as yet. He has proved

his losses.

[39] I am of the view that given the evidence, nothing less than the maximum permissible compensation prescribed by the Act is just and equitable.

O R D E R

MASERUMULE AJ:

1. The dismissal of the applicant for alleged operational requirements by the second respondent on 15 December 1997 was without a valid reason and was not in accordance with a fair procedure.

2. The second respondent is ordered to pay to the applicant the amount of R119 640,00, representing the applicants twelve months' pay.

3. The amount referred to in paragraph 2 is to be paid within 14 days of the date of this judgment.

4. The second respondent is ordered to pay applicant's costs, including the cost of one counsel.

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MASERUMULE AJ

4. The second respondent is ordered to pay applicant's costs, including the cost of one counsel.

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MASERUMULE AJ