IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: JA51/03

In the matter between

NATIONAL ENTITLED WORKER'S UNION	APPELLANT
And	
COMMISSIONER FOR CONCILIATION, MEDIATION AND ARBITRATION (CCMA)	1ST RESPONDENT
NANA KEISHO N.O	2ND RESPONDENT
GEORGE LALETA MANGANY	3RD RESPONDENT
MINISTRY: JUSTICE AND CONSTITUTIONAL DEVELOPMENT REPUBLIC OF SOUTH AFRICA	4TH RESPONDENT
THE MINISTER: JUSTICE AND CONSTITUTIONAL DEVELOPMENT	5TH RESPONDENT
REPUBLIC OF SOUTH AFRICA	
MINISTRY: LABOUR REPUBLIC OF SOUTH AFRICA	6TH RESPONDENT
THE MINISTER OF LABOUR REPUBLIC OF SOUTH AFRICA	7TH RESPONDENT

JUDGMENT

Jappie AJA.

Background

[1] The appellant is a registered trade union duly registered as such under the Labour Relations Act, Act No. 66 of 1995 ("the Act"). On the 1st February 2001 the appellant employed the third respondent as a union official. On the 21st March 2001 members of the appellant elected the third respondent as its deputy president. It was expected that the third respondent would serve in office for a period of two (2) years. However on or about the 6th April 2002, the third respondent wrote a letter to the general secretary of the appellant advising that his services at the appellant were being terminated with immediate effect. The reason given for resigning was "due to the manner/way in which this organization is being run I feel that it is impossible for me to continue working and serving on the board of this organization." A dispute arose between the appellant and the third respondent. The appellant felt aggrieved by the third respondent's resignation because the third respondent had not followed "a fair procedure and given (sic) specific reasons." The appellant took the view that for that reason the third respondent's resignation violated the 'employer's constitutional rights to fair labour practices". A dispute arose between the parties whether the third respondent's resignation constituted an unfair labour practice

[2] On the 15th April 2002 the appellant referred the dispute to the first respondent, complaining that "the third respondent had resigned before and without having followed in [a] fair procedure and given (sic) specific reasons." It said that in doing so, he had violated his "employer's constitutional rights to fair labour practices." Such rights, it was said, were conferred by section 23(1) of the Constitution. The desired outcome was stated to be "compensation for this unfair labour practice."

[3] The second respondent was employed by the first respondent as a case management officer. She dealt with the appellant's referral of the dispute to the CCMA. On the 18th April 2002 she wrote to the appellant

acknowledging receipt of its referral. However, she went on to inform the appellant that "the case had been closed". The reason she gave was that the first respondent lacked "jurisdiction to entertain the matter as it did not amount to "an unfair labour practice under the LRA".

[4] The appellant thereafter applied to the Labour Court, under section 158(1)(g) of the Act, for the "ruling" of the second respondent to be reviewed and set aside. It also sought an order declaring in effect that the failure of the Act and the Employment Equity Act No 55 of 1998 (" the EEA") to provide employers with a remedy against unfair labour practices perpetrated against them by their employees when provision is made for such protection to employees against employers is unconstitutional. Certain other consequentional relief was also claimed.

[5] In the proceedings before the Labour Court the bases upon which the appellant attacked the decision of the second respondent was that the decision was taken without the appellant and other parties-having been given an opportunity to be heard and that the decision was invalid as it was inconsistent with sections 9,23(1) and 34 of the Constitution. The Labour Court dismissed the application for review. The reason given by the Labour Court was that the concept of an unfair labour practice does not embrace a labour practice committed by an employee against an employer. The Labour Court further concluded that the second respondent correctly refused to accept the appellant's referral. It stated that no purpose would have been served by affording the appellant a hearing. It concluded that the application to review and set aside the second respondent's decision, therefore, fell to be dismissed. The Labour Court found no merit in the appellant's complaint that the second respondent's decision was unconstitutional or that the Act and the EEA were unconstitutional.

[6] The Labour Court refused the appellant leave to appeal. The appellant petitioned this Court and was granted leave to appeal against the whole of the judgment of the Labour Court.

[7] **The Appeal**

As already indicated above the order that the appellant sought in the Court a quo was in effect one that declared that the Act and the EEA were unconstitutional in so far as they fail to make it an unfair labour practice for an employee to resign from his employer's employ without following a fair procedure and without a fair reason. The appellant also sought an order that would effectively compel the passing of an Act within six months of the date of the order which the appellant contended would have the effect of prohibiting or preventing "unfair discrimination of the employers" and to prevent or prohibit employees from committing unfair labour practices against their employers. The appellant also sought an order detailing what the legislation it desired to be enacted would contain. One of the things that the appellant wrote should be included in such legislation is a provision that would say: "*Desertion is automatically unfair*." There were other orders sought which it is not necessary to refer to.

[8] In the course of argument it was suggested to the union official who appeared for the appellant that there could be merit in the argument that the first and second respondents were not entitled to decide that the CCMA had no jurisdiction to entertain the dispute without affording the appellant an opportunity to be heard. It was pointed out to the union official that, if the Court reached that conclusion, the matter might have to be remitted to the CCMA for it to be dealt with properly by giving the appellant an opportunity to be heard. The union official elected to abandon this part of his case because of the possible delays that could occur if the matter were remitted to the CCMA to be dealt with afresh. He elected to proceed before this Court only in regard to the question whether the failure of the Act and or the EEA to provide for the protection of employers against unfair labour practices perpetrated against them by employees is unconstitutional.

[9] The nub of appellant's argument is that under the Act and the EEA the employer has no remedy and no means of enforcing his/her/its rights

enshrined in section 9, section 23(1) and section 34 of the Constitution.

[10] The appellant relied on the provisions of section 9(1), and section 34 of the Constitution in support of its case. With regard to section 9(1) the appellant contended that the failure by the Act and the EEA constituted a violation of the employers' rights to equality before the law and a denial of equal protection and benefit of the law as enshrined therein.

Section 9 of the Constitution reads thus:

> "9. Equality. -(1) -Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

Section 23(1) provides as follows:-

> "Everyone has the right to fair labour practices".

Section 34 provides:-

> ''Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[11] In support of its argument the appellant referred to the case of *Roffey v Catterall, Edwards Gaudre (Pty) Ltd 1977 (4) SA* 494 (N) at499E-H where it was said:

> ''The explanation for this habit is the supposed bargaining inequality of the employees, which has long been taken for granted. No doubt that was their general condition once upon a time, and even today it is no rarity. But it is surely unrealistic, nowadays at any rate, to postulate such imbalance as a universal truism. Economic development, industrial legislation, trade unionism, and other modern phenomena have so strengthened large categories of employees that their negotiating force is often equivalent or superior to that of their employers. The same may be the result of a mere demand for services which exceeds the supply. Agreements between unequal parties are easily conceivable and frequently encountered, on the other hand, outside the field of employment. The distinction has therefore become archaic and artificial."

[12] In terms of section 1 of the Act, the purpose of the Act is "*to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act…". One of the primary objects given therein is that the Act seeks "to give effect to and regulate the fundamental rights conferred by*

section 27 of the Constitution." Of course, the reference to section 27 of the Constitution is a reference to section 27 of the Interim Constitution of 1993. That reference must now be taken as a reference to section 23 of the final constitution. Accordingly, this means that the Act seeks, among other things, to give effect to the constitutional right to fair labour practices conferred on "everyone" by section 23(1) of the Constitution. In addition, section 2 of the Basic Conditions of Employment Act 75 of 1997("the BCEA") provides that the purpose of that Act is "*to advance economic development and social justice by fulfilling the primary objects of this Act …*" One of the primary objects of the BCEA as given in section 2 is "*to give effect to and regulate the right to fair labour practices conferred by section 23(1) of the Constitution …*" The relevance of the BCEA is twofold. The one reason is that as already indicated, part of its purpose is to give effect to and regulate the constitutional right to fair labour practices provided for in section 23(1) which the appellant relies upon. The second is that the BCEA makes provision in section 36 thereof for the termination of a contract of employment by either party to it including by way of a resignation.

[13] In so far as section 185 of the Act is relevant herein, it provides that "(e) very employee has the right not to be –

(a) unfairly dismissed;"

Section 186 of the Act deals with the meaning of "dismissal" and an "unfair labour practice".

Section 186(1) reads:

"(1) Dismissal means that-

(a) an employer has terminated a contract of employment with or without notice;

(b) an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;

(c) an employer refused to allow an employee to resume work after she –

(i) took maternity leave in terms of any law, collective agreement or her contract of employment; or

(ii) ……

(d) an employer who a number of employees of the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or

(e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.

(f) an employee terminated a contract of employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer."

[14] It will be seen from the above that, whereas the Act does provide for an employee's right not to be dismissed unfairly, it makes no provision for

the right of an employer not to have the contract of employment terminated unfairly by an employee. It is clear form the meaning of dismissal in section 186 that dismissal does not include a situation where the employee resigns unfairly from the employer's employ. This is the appellant's complaint.

[15] It is true that the Act does not provide an employer with a cause of action and/or remedy where his employee resigns or terminates the contract of employment unfairly – as opposed to unlawfully. However, I do not think that this failure renders the Act unconstitutional. Legislation is enacted if a need for legislation has arisen.

Under the common law the employer's position was very strong as against an employee. If an employee was dismissed lawfully e.g. if he was given proper notice of termination of his contract of employment or if he was paid notice pay in lieu of notice, the employee had no remedy in law even if the employer had no reason to terminate the contract of employment or even if the dismissal was very unfair. The Courts could also not provide any remedy in that situation. If the contract of employment was terminated unlawfully, generally speaking, the only relief that the Courts could provide to such employee was to award the employee damages which would be equivalent to the notice pay he would have been paid in lieu of notice. The unfair labour practice jurisdiction was introduced partly to provide employees with greater protection in circumstances where there was a great need.

[16] In general the position of employers is different from that of employees, particularly in this country. In general terms it can be said that, when an employer has lost an employee due to resignation, the employer does not need the Courts to deal with the situation. Employers will normally simply look for another employee and, in most cases, will find an employee to replace the one who has resigned. Where the employee has resigned without giving notice in circumstances where he was obliged to give notice, usually the employer does not even sue the employee for damages which in law he would be entitled to do and the damages would be the equivalent of the notice pay. However, if an employer wants to sue an employee in such a situation, he does have a right to do so both at common law and in terms of the BCEA. Employers hardly use even this right.

[17] Under the Labour Relations Act, 1956 (Act 28 of 1956)("the old Act") employers had a right to bring unfair labour practice claims against employees for virtually any conduct on the part of employees other than a strike prior to 1988 and even for some period after 1988 even then in regard to a strike. The definition of an unfair labour practice in the old Act was wide enough to cover even a termination of a contract of employment which was occasioned by the resignation of an employee. And yet, when one has regard to all the unfair labour practice cases reported in the Industrial Law Journal from 1982 up to 1997 – a period during which the Industrial Court was active or operational – one can hardly find a case brought to the Industrial Court

by an employer against an employee complaining that the employee's resignation constituted an unfair labour practice. This situation must be contrasted with the fact that the Industrial Law Journal is replete with cases brought by employees and trade unions against employers concerning dismissals that were alleged to constitute unfair labour practices. The fact that employers had a right to bring such claims in the Industrial Court but hardly ever brought them suggests that there was no need for such a right to be provided for. Furthermore, it needs to be pointed out that, when one has regard to the current Act, one notes that this case appears to be the first one where an employer complains about this omission in the Act. And very strangely, the employer who complains about this is not an ordinary employer but a trade union. This is a trade union which desires that employers should have a cause of action based on unfairness and to use it to take employees to the CCMA or the Labour Court when they have resigned unfairly. This is strange, indeed!

[18] Why does this employer cum trade union want employers to have such a right? I assume that this employer cum union would not be satisfied with the position that, if the resignation is unlawful, the employee would be obliged to pay the employer damages by way of notice pay but wants to seek an order for compensation such as the compensation claimable by an employee under section 194 of the Act. I assume further that the employer would want an order for the reinstatement of the employee. If such an order were to be made, the employee could

be compelled to work for an employer whom he does not want to work for anymore.

[19] South Africa is not the only country which makes provision for employees not to be unfairly dismissed and makes no provision for employers not to be subjected to unfair resignations. Even the ILO Convention 158 on the Termination of Employment provides protection for workers against unjustified dismissals but makes no provision for the protection of employers against unfair or unjustified resignations by employees.

[20] In the light of all of the above it seems to me that generally it is not thought that employers need any protection against unfair resignations by employees. And, if there is no problem in this regard, there is no need for legislation conferring such protection upon employers. Employers are sufficiently powerful when compared with individual workers acting individually to be able to deal with unfair resignations adequately without a statutory right not to be subjected to unfair resignations. The remarks made by Didcott J in the Roffey case referred to above cannot be read to mean that the majority of employees now have equal bargaining power with employers. The majority of workers in this country are still ununionised and remain extremely vulnerable.

[21] I note that in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (1996) 17 ILJ 821 (CC) at 840 B – 842C the Constitutional Court dealt, among others, with a complaint by some employers that the failure of the text of the final Constitution to include the employers' right to lock-out when it included the employees' right to strike offended

against the principle of equality. The Constitutional Court said that this argument was based on the proposition that "*the right of employers to lock-out is the necessary equivalent of the right of workers to strike and that, therefore, in order to treat workers and employers equally, both should be recognised in the NT*." (par 665 of the judgment). The Constitutional Court went on to hold that "(t) hat *the proposition cannot be accepted*." The Constitutional Court expressed the view:

> ''*Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers.*" (par 66).

I pause here to point out that, with regard to the present case, it can be said that protection against unfair termination of contracts of employment is based on the fact that employers enjoy greater social and economic power than that which individual workers have. That is why legislation, not only in this country but also in many other countries in the world, makes provision for the protection of employees against unfair or unjustified dismissals but provides no protection for employers against unfair resignations or termination of contracts of employment against workers.

[22] In the last sentence in par 66 of its judgment the Constitutional Court stated: "*The argument that it is necessary in order to maintain equality to entrench the right to lock-out once the right to strike has been included, cannot be sustained, because the right to strike and the right*

to lock-out are not always and necessarily equivalent." In the present case too, the argument is that the employer and the employee are not being treated equally or the employer is being unfairly discriminated against because the employee is afforded the right not to be dismissed unfairly but the employer is not afforded a right not to be subjected to an unfair resignation or an unfair termination of the contract of employment by an employee. In my view the employer remains very economically strong compared to an individual worker and the fact that this protection is afforded the employee but no similar protection is afforded the employer does not come anywhere near to diminishing the power that the employer has. If legislation were enacted which would give employers such protection, the weak position of the individual worker would be weakened further and that of the employer would be even stronger. Indeed such legislation – which the Appellant would be very happy with – would be a step backwards in the field of labour relations and employment law in our country.

[23] In all of these circumstances I am of the view that the appellant's appeal has no merits and should be dismissed. As to costs, I think that the appellant should be ordered to pay the costs of the respondent who opposed this appeal. It is difficult to understand exactly what the appellant sought to achieve by instituting this litigation. It just seems to me to have been wholly unnecessary from the point of view of practicality.

[24] In the result the appeal is dismissed with costs.

Jappie AJA

I agree.

Zondo J.P

I agree.

H.M Musi AJA

Appearances

For the appellant : Mr D Maluleke

Instructed by : National Entitled Workers Union

For the respondent : Adv. V Soni SC
Instructed by : State Attorney

Date of judgment : 13 March 2007