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THE COST OF HIDING A DISMISSAL UNDER THE GUISE OF RETRENCHMENT

by Maserumule Corporate Employment Law

INTRODUCTION

Retrenchment, when used genuinely and transparently, is a lawful mechanism for employers to navigate economic challenges and adapt to changing business needs. However, when used as a smokescreen to disguise retaliatory dismissals, it becomes a tool of exploitation, undermining the very essence of fairness and justice entrenched in South African labour law.

The recent Labour Court decision *in Mqikela v Pristo Response Trading*[1] serves as a stark reminder that the judiciary will not hesitate to unmask disguised dismissals especially where the real motivation is a punitive response to the exercise of statutory rights. The case underscores the severe consequences for employers who attempt to manipulate the process under section 189 of the Labour Relations Act, 1995 (LRA), to avoid accountability.

This article critically examines the facts, the proceedings before the Commission for Conciliation, Mediation and Arbitration (CCMA), the Labour Court's analysis, and the broader implications for employers seeking to lawfully retrench employees in sensitive contexts.

SUMMARY OF FACTS

The employee was employed as the Human Resources Manager at the Pretoria branch of Pristo Response Trading ("the Company"). In 2020, she raised a grievance against the company's sole director, citing unfair treatment regarding salary increases and the non-payment of certain bonuses.

Despite her efforts, the grievance remained unresolved for nearly a year. On 31 January 2022, after exhausting internal avenues, the employee exercised her rights under the LRA and referred an unfair labour practice (ULP) dispute to the CCMA. The very next day, on 1 February 2022, she was informed that her position was at risk due to a planned outsourcing of the HR function. Soon thereafter, the company issued a formal notice in terms of section 189(3) of the LRA, citing financial constraints and the alleged loss of key contracts as the basis for contemplated retrenchment. Crucially, only the employee's position was affected. Following two consultation meetings and continued protest from the employee that the process was retaliatory, she was dismissed on 1 April 2022.

CCMA PROCEEDINGS

Following her dismissal, the employee referred the matter to the CCMA for conciliation. The core of her claim was that her dismissal was automatically unfair in terms of section 187(1)(d) of the LRA on the grounds that she was dismissed for exercising her rights under the Act, specifically, by lodging a ULP dispute. Although conciliation failed, the matter progressed to the Labour Court for adjudication.

LABOUR COURT PROCEEDINGS

In the Labour Court, the employee maintained that her dismissal was not a legitimate retrenchment but retaliation for her CCMA referral. She sought the maximum compensation of 24 months' remuneration for an automatically unfair dismissal but ultimately requested 20 months' pay in her final submissions. The company countered that the dismissal was necessitated by operational requirements. It claimed that it had lost key contracts, decided to outsource its HR function, and no longer required an HR manager at the Pretoria site.

The court, however, found the company's version to be riddled with contradictions and inconsistencies. The reasons advanced during litigation differed from those listed in the section 189(3) notice. Evidence from the managing director of the company and its labour consultant contradicted each other regarding

[1] (JS562/22) [2025] ZALCJHB 243

when the retrenchment was first contemplated. The company's claim that the HR function had ceased at the site was not part of its pleaded case nor reflected in any documentation. Most significantly, the timeline strongly suggested that the dismissal was only contemplated after the employee referred the ULP to the CCMA.

LEGAL ANALYSIS OF SECTION 187(1)(d)

Section 187(1)(d) of the LRA renders a dismissal automatically unfair if the reason is that the employee acted against the employer by exercising any right conferred by the Act. The court drew a clear distinction between internal grievance procedures and statutory dispute resolution mechanisms. Following the precedent in *DBT Technologies v Garnevska*[2], the court held that the mere filing of an internal grievance does not constitute exercising a statutory right under the LRA. However, referring a dispute to the CCMA clearly does. The employee's referral to the CCMA was therefore protected conduct, and retaliating against her for that referral violated her statutory rights.

The court applied the established two-stage test for determining the reason for dismissal: factual and legal causation. It asked: would the employee have been dismissed but for the protected conduct? In other words, was the protected conduct the dominant or proximate cause? On the evidence presented, the court concluded that the company would not have dismissed the employee had she not referred the ULP to the CCMA. It rejected the outsourcing explanation as an ensuing rationalisation lacking documentary support. The timing, the inconsistencies, and the absence of any objective operational rationale led the court to conclude that the retrenchment was a "façade" - a deliberate attempt to conceal a retaliatory motive.

Given the deliberate misconduct by the company and the significant prejudice suffered by the employee, who remained unemployed for more than 36 months, the court awarded her 20 months' compensation, amounting to R300,000. It further awarded costs against the company noting that the company had "come before the court with dirty hands."

CONCLUSION

The judgment in *Mqikela v Pristo Response Trading* is a textbook example of how the courts apply a substance-over-form approach when scrutinising dismissals. Where the formality of a retrenchment process is used as a smokescreen to penalise an employee for asserting their rights, the Labour Court will not hesitate to pierce the veil and impose significant consequences on the employer. The decision reinforces the importance of consistency, credibility, and good faith in managing retrenchments particularly where those processes arise close in time to an employee asserting their rights under the LRA.

KEY TAKEAWAYS FOR EMPLOYERS AND HR PRACTITIONERS

Retrenchments must be genuine, evidence-based, and procedurally fair. If a retrenchment process is used to retaliate against an employee for asserting their rights under the LRA, the employer risks a finding of automatically unfair dismissal and maximum compensation awards.

Proximity matters. A retrenchment or other disciplinary action that occurs immediately after an employee lodges a statutory dispute (e.g., a CCMA referral) invites suspicion. Employers must demonstrate that such actions were contemplated independently and prior to the protected conduct.

Document your process rigorously. Employers should ensure that the operational rationale, consultations, and alternatives considered are clearly documented in the section 189(3) notice and throughout the consultation process. Vague or inconsistent reasoning will undermine the employer's case. Avoid contradictory evidence. Inconsistencies between witnesses, documents, and pleadings severely undermine the employer's credibility. Witnesses should be properly briefed and prepared.

Recognise the legal difference between grievances and statutory rights. While an internal grievance may not attract the same legal protection as a CCMA referral, once an employee initiates external proceedings, they are exercising a statutory right under the LRA.

Cost implications are real. Litigating dishonestly or in bad faith may result in adverse cost orders. Courts expect truthfulness and transparency, and employers who misrepresent facts risk paying the legal costs of the other side.

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[2] (JA61/2018) [2020] ZALAC 26

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Links to cases:

1. https://www.saflii.org/za/cases/ZALCJHB/2025/243.html
2. https://www.saflii.org/za/cases/ZALAC/2020/26.html