



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA72/2020

In the matter between:

REEFLORDS PROPERTY DEVELOPMENT (PTY) LTD Appellant

and

LAUREN DE ALMEIDA Respondent

Heard: 8 March 2022

Delivered: 16 March 2022

Coram: Phatshoane ADJP, Savage and Phatudi AJJA

JUDGMENT

SAVAGE AJA

Introduction

- [1] This appeal, with the leave of the Labour Court, is against the judgment and orders of that Court (Lagrange J) delivered on 15 October 2019 in which the dismissal of the respondent, Ms Lauren De Almeida, on grounds of operational requirements was found to be procedurally and substantively unfair with the appellant, Reeflords Property Development (Pty) Ltd, ordered

to pay the respondent six months' compensation in the amount of R132 000,00 and costs.

- [2] The respondent was employed by the appellant during 2014 in its sales department and, with effect from 15 February 2015, as operations coordinator of the sales department. In 2016, the respondent took maternity leave and returned to work in September 2016. On 29 September 2016, she was called to a meeting with three senior colleagues and given until 5 October 2016 to consider their proposal that she be moved out of the sales department into the respondent's development department. The following day, on 30 September 2016, at a meeting of the sales department she was told that certain of her functions were allocated to the new head of that department. On 5 October 2016, the respondent indicated that she would not accept the proposal to move her to the development department. At meetings on 6 and 11 October 2016, she was informed that, despite her lack of marketing experience, she was to be removed from operations and was to undertake marketing functions.
- [3] On 13 October 2016, the respondent lodged a grievance related to the change in management structure, the removal of her duties and job title and contended that this amounted to a demotion. She proposed that she be reinstated into her position in operations on the same terms and conditions as she had enjoyed prior to her maternity leave. The grievance was not resolved.
- [4] On 28 October 2016, the appellant gave the respondent notice in terms of section 189(3) of the Labour Relations Act 66 of 1995 ('the LRA') of her possible dismissal based on its operational requirements given the restructuring of the business and the redundancy of her position. The notice proposed that to avoid retrenchment, the respondent be employed in the alternative position of marketing executive. At the second consultation meeting on 7 November 2016, the respondent agreed that she would accept an appointment into the alternative position on certain conditions, namely that she receive training and guidance in the new position and that she be paid the AA-recommended per kilometre rate as a travel allowance. On 9 November 2016, a contract of employment for the new position was provided to the

respondent. It made no provision for any training or the kilometre rate to be paid to her as a travel allowance.

- [5] On 28 November 2016, after her return from sick leave, the respondent wrote to the appellant refusing to accept the alternative position offered, stating that:

‘...You have provided me with an alternative position. This position is not a reasonable one. I am unable to do the job as I do not have the necessary experience and skill. You have refused to provide me with training to undertake the job. I understand that the last consultation will be held at the next earliest convened date. I will attend the consultation.’

- [6] The appellant did not respond to the letter. At the third consultation meeting held on 30 November 2016, the appellant did not accept that the contract provided to the respondent had in error omitted a reference to the training or the AA rate to be paid; nor did it offer to correct the contract to insert these aspects so as to accord with the terms agreed at the second consultation meeting. The respondent refused to accept the alternative position on the basis that it was not a reasonable one and indicated at the meeting that the appellant had made its position clear. Following the third consultation meeting, the respondent was informed that she was to be retrenched and was not required to serve a notice period.

- [7] Aggrieved with her dismissal, she referred an unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration (‘CCMA’) for conciliation, together with a claim that her dismissal had been automatically unfair for a reason related to her pregnancy. Conciliation was unsuccessful and the respondent referred the matter to the Labour Court.

Proceedings before the Labour Court

- [8] At the hearing of the matter, the Labour Court granted the appellant’s application for absolution from the instance in respect of the respondent’s automatically unfair dismissal claim. In respect of the unfair retrenchment claim, the Court found that the appellant should have embarked on consultations before reallocating the respondent, removing her duties in the

sales department and making her post redundant. Although the entire process was not a sham, with the alternative position a genuine position which was occupied by others after the dismissal of the employee, the dismissal was procedurally unfair given the appellant's conduct in prematurely reallocating the respondent and its failure to pursue a joint consensus-seeking agenda as was evident from its conduct at the last consultation meeting. Furthermore, while a restructuring of the sales department may have been required in that it was the only department that had three managers, the manner in which it occurred, including the reallocation of the respondent's duties, had prematurely precipitated her redundancy prior to embarking on a section 189 process.

[9] The Court continued that:

'The real crux of the case relating to substantive unfairness concerned the failure to appoint [the respondent] to the marketing executive post as an alternative to her retrenchment. By the end of the second consultation meeting it appears to have been common cause that [the respondent] was willing to accept the position subject to being provided with training in respect of any areas of the marketing position where she lacked proficiency and that she would be provided with the transport allowance based on AA mileage rates.'

[10] The Labour Court found that, on the probabilities, if the training and AA rate had been included in the written terms and conditions of the marketing executive post offered, it would not have been rejected as an alternative to retrenchment and there would have been no need to retrench the respondent. The respondent's retrenchment was found to be substantively unfair in that the appellant had failed to establish that she had unreasonably refused to accept alternative employment and accordingly her dismissal could have been avoided.

[11] Since the respondent did not seek reinstatement, the Court had regard to the fact that there was "effectively consensus on retaining [the respondent], but no attempt was made to rectify the situation when the discrepancy between the oral undertakings and written undertakings came to light." Although the

appellant had acted in bad faith in this regard and ought to have avoided the respondent's retrenchment, the respondent's "less than clear representations after the second consultation and jettisoning her representative at an advanced stage, helped to exacerbate the difficulty of resolving matters". This, together with the fact that the respondent commenced employment in February 2015, was found to have a bearing on compensation. The appellant was therefore ordered to pay the respondent six month's remuneration, amounting to R132 000,00, with costs save for those costs incurred in preparing and presenting argument in the application for absolution.

Submissions of the parties

- [12] The appellant contended on appeal that the Labour Court had erred in finding the respondent's dismissal procedurally and substantively unfair since she was offered and had accepted the alternative marketing executive position at the second consultation meeting, yet thereafter unreasonably refused to accept the post. Although the appellant did not reply to the respondent's letter of 28 November 2016, issue was taken with the respondent's refusal to accept what was a reasonable alternative. This, it was submitted, made her dismissal on the grounds of operational requirements fair and an order of compensation, as a result, ought not properly to have been made. In addition, issue was taken with the costs order imposed by the Labour Court in that costs ordinarily are not imposed in labour matters.
- [13] Although heads of argument were filed on behalf of the respondent, there was no appearance for the respondent at the hearing of the appeal. When contacted by the Registrar of the Court, the respondent's attorneys of record indicated that she would abide by the decision of the Court. In the heads of argument filed on the respondent's behalf, it was argued that the alternative position would have been accepted had the conditions of training and the reimbursement of the respondent's travel at the AA rate been met. However, on receipt of the contract of employment these terms were excluded. There was no response to the respondent's letter and the appellant showed no interest in resolving the issue at the third consultation meeting. As a result, no reasonable alternative was provided to the respondent and the Labour Court

was correct in finding the dismissal procedurally and substantively unfair. The respondent therefore sought that the appeal be dismissed with costs.

Evaluation

[14] Section 189(2) of the LRA requires that:

- (2) The employer and the other consulting parties must in the consultation envisaged by subsections 91) and (3) engage in a meaningful joint consensus-seeking process and attempt to reach consensus on –
 - (a) appropriate measures –
 - (i) to avoid the dismissals;
 - (ii) to minimise the number of dismissals;
 - (iii) to change the timing of the dismissals; and
 - (iv) to mitigate the adverse effects of the dismissals.
 - (b) the method for selecting the employees to be dismissed; and
 - (c) the severance pay for dismissed employees'

[15] To be meaningful, a consultation in the context of a contemplated retrenchment must be genuine and engaged in with the purpose of seeking alternatives to avoid dismissal.¹ At the second consultation meeting, the appellant presented an alternative, which was accepted by the respondent on condition that training was provided and that the AA rate for travel was paid. If this position had been offered to the respondent, it would have constituted a reasonable alternative to retrenchment.

[16] Inexplicably, when the contract of employment in respect of the alternative position was provided to the respondent, the issue of training and the payment of AA rates were both omitted. This was so despite the known fact that it was on the basis of their inclusion that the alternative position was acceptable to the respondent. No explanation was provided by the appellant why it had backtracked from its offer made at the second consultation

¹ *SA Clothing and Textile Workers Union and Others v Discreto A Division of Trump and Springbok Holdings* (1998) 19 ILJ 1451 (LAC) at para 8; *Super Group Trading (Pty) Ltd v Janse van Rensburg* [2012] ZALAC 7 (25 April 2012) at para 20.

meeting. In addition, when the respondent gave the appellant notice in writing, prior to the third consultation meeting, that she was not satisfied with the alternative set out in the contract received by her, the appellant elected not to respond to the letter and provided no satisfactory reason for its failure to do so.

- [17] The appellant adopted the same stance at the third consultation meeting when it made no offer to correct the terms of the contract provided to the respondent to reflect the terms of the agreement reached by the parties at the second meeting. Instead, the appellant appeared content to accept the respondent's dissatisfaction with the appellant's conduct and her refusal, as a result, to accept the alternative offered on terms distinct to those agreed. The appellant did so at its own peril. In refusing to adhere to the terms of the agreement previously reached concerning the terms on which the alternative position would be offered, the appellant acted both in bad faith and unfairly. The offer of the alternative position, without training, was not reasonable given the respondent's clear indication that she lacked the necessary skills for the job. In refusing to provide a reasonable alternative to the appellant, in the form of the alternative proposed in conjunction with the terms discussed and agreed in the course of a joint consensus-seeking process between the parties, or any other position, the appellant's resultant dismissal of the respondent was unfair. The issue taken by Mr Lennox, in argument, with the conduct of the respondent in refusing the position ignores that she adopted this stance as a direct consequence of and in response to the appellant's inexplicable refusal to offer the alternative position on the terms that had been agreed between the parties.
- [18] In the circumstances, the Labour Court cannot be faulted for finding the dismissal of the respondent both procedurally and substantively unfair. In exercising its discretion to award limited compensation to the respondent, the Court had regard to relevant considerations including those favourable to the appellant and weighed these up in the manner required of it. There exists no basis on which to warrant interference with the manner in which it exercised its discretion in this regard, or the amount of compensation ordered.

[19] As to costs, having regard to considerations of law and fairness, the order made by the Labour Court that the appellant pays the respondent's costs, save for those incurred in preparing and presenting argument in the application for absolution, in the absence of clear justification for such an order did not accord with the ordinary rule of costs that applies in labour matters. That order consequently falls to be set aside on appeal. There is also no reason why an order of costs should be made in this appeal.

Order

[20] In the result, the following order is made:

1. The appeal succeeds only in respect of the issue of costs.
2. The costs order made by the Labour Court is set aside.

SAVAGE AJA

Phatshoane ADJP and Phatudi AJA agree.

APPEARANCES:

FOR THE APPELLANT: M A Lennox

Stewart-Garden Attorneys

FOR THE RESPONDENT: No appearance

Heads of argument prepared by Cliffe Dekker
Hofmeyr Inc.