

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO. CA9/00

In the matter between:

WINDA VISSER

Appellant

And

SANLAM

Respondent

JUDGMENT

DAVIS AJA:

Introduction

- [1] This is an appeal against a judgment of **Arendse AJ** in which he dismissed an action concerning the retrenchment of appellant by respondent with effect from 31 October 1998. The respondent cross-appeals, contending that it should have been awarded its costs.

Facts

- [2] In February 1998 respondent commenced a process of restructuring a division of its business enterprise called EBIZ. EBIZ was an independent division within respondent with its own cost centre and with the specific business objective of promoting all aspects of electronic business of respondent. A document prepared

by Mr Christodolou, the managing director of respondent dated 2 June 1998, set out the reasoning behind the adoption of the preliminary decision thus: “Sanlam management has considered what portion of EBIZ, if any, is Sanlam’s core business and what is non-core. Sanlam management is of the view that a large proportion of EBIZ is non-core business which will function better outside of Sanlam. The effect of the outsourcing will be an EBIZ function which is better placed outside of Sanlam in line with Sanlam’s focus on core business.”

[3] Significant implications for staff flowed from this decision as all the posts in that part of the EBIZ division which were to be outsourced would be abolished within respondent. Mr Christodolou attempted to explain steps which would be taken to minimise any disadvantage to staff: “We are confident that we can negotiate with the new company to offer you alternative employment with similar terms and conditions to that which you currently enjoy. In such circumstances no severance pay will be payable. If for some reason you are not offered an alternative post in the new company, we will attempt to redeploy you within Sanlam.”

[4] Concern was expressed by a number of the employees of respondent who worked within EBIZ. At a meeting of 24 June 1998, employees expressed concern with respect to the nature and meaning of the concept of outsourcing as it applied to EBIZ. They demanded some measure of certainty as to which functions within EBIZ would remain with respondent. On 14 July 1998 Mr Hannes van Rensburg of respondent replied by way of an e-mail to all concerned members of EBIZ dealing, at least to some extent, with queries raised and inviting them to make alternative proposals within the following week in order that these may be considered.

[5] Notwithstanding these concerns, negotiations continued with BSW to take over the business of EBIZ. Negotiations on behalf of respondent were conducted by a project

team of which appellant was a member. At this stage of the negotiations it was envisaged that some fifty of the EBIZ personnel would be transferred to an entity known as BSW and that those EBIZ personnel who were not transferred would remain in the employ of respondent. In accordance with a document prepared by Mr Botha of respondent on 12 June 1998, EBIZ personnel not transferred to BSW were informed that , “if their functions are retained they will report to Lizé Lambrechts, if their functions are not retained in Sanlam they will be treated as ‘oortolliges’.”

[6] Pursuant to the initial decision to outsource to BSW, most of the EBIZ staff including appellant were moved physically into the offices of BSW, on 27 July 1998.

[7] Critical to the determination of the number of EBIZ personnel who would be transferred to BSW was the range of activity which respondent intended to transfer to BSW, in terms of contractual arrangements to be entered into between the two parties.

[8] On the 24 July 1998, a further meeting took place between representatives of management of respondent and EBIZ personnel including appellant in which the following statement of Mr George Holtzhausen, manager of EBIZ and a superior of appellant appears from the minute of this meeting: “George noem dat van die personeel by die ‘ou’ eBIZ (A) gaan oorskyf na die nuwe e-BIZ (B). Diegene wat nie by B gaan wees nie, sal ‘n e-BIZ Pool wees en daarna sal die persoon deur ‘n inkortingsproses gaan”. The negotiations had proved somewhat more complex than anticipated by at least certain of the EBIZ personnel. Accordingly at a meeting on 5 August 1998 at which appellant was not present, Mr Holtzhausen expressed the concern of many of EBIZ personnel thus: “George het dit duidelik gestel dat hy die e-BIZ personeel se frustasie verstaan en hy wil graag ook net noem dat al is daar personeel wat reeds na Nobelpark oorgeskuif het, is daar nog geen aanbod aan dié personeel gemaak nie – hierdie personeel het (soos dié personeel wat nog in Sanlam is) geen idee waar hulle geplaas gaan word nie en poste moet nog individueel met ALMAL onderhandel word”.

[9] On 14 August 1998 a further meeting took place at which appellant was also not present. At this meeting it was announced that Holtzhausen was leaving the

employ of respondent and that BSW would offer employment to ten persons even though no contracts with respondent had yet been concluded. Later that evening Holtzhausen contacted appellant and informed her of the nature of the meeting, in particular that the transaction with BSW had fallen through and that she would be placed on the "oortollige list".

[10] On or about 17 August 1998 another meeting was held with EBIZ personnel at which Mr van Rensburg of respondent announced that EBIZ personnel would be divided into three groups, namely group A where offers from BSW had been received, group B where respondent would enter into individual contracts with personnel and group C, the so-called "oortollige lys". The minutes of the meeting reflected that Mr Van Rensburg said "Persone wat wil aansoek doen vir 'n vrywillige skeidingspakket moet skriftelik aansoek doen en redes verskaf waarom die betrokke persoon nie die BSW aanbod en/of 'n Sanlam herplasing wil aanvaar nie.

.....Persone in groep C wat onseker is oor werksekuriteit kan voorstelle aan bestuur voorlê waarop daar formeel gereageer moet word."

[11] On 31 August 1998 appellant requested voluntary retrenchment but withdrew this request on 3 September. She then received a job offer from Brain Ware, a new business organisation in which Holtzhausen was involved but she refused to consider it. By the time she changed her mind no further position at Brain Ware was available. She then approached Mr Vic van Vuuren a senior executive of respondent, in an attempt to secure an alternative position within respondent's organisation but without success. She was finally dismissed in terms of a notice dated 23 September 1998, with effect from 31 October 1998.

Appellant's case

[12] Mr Rautenbach, who appeared on behalf of appellant, submitted that notwithstanding respondent's substantively justifiable grounds for the decision to outsource EBIZ, it had breached the procedural requirements provided for in section 189(2) of the Labour Relations Act 66 of 1995 as amended (LRA). In

terms of section 189(2) “[t]he consulting parties must 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 *dismissal*;
 - v) the method for selecting the *employees* to be dismissed;
 - vi) the severance pay for dismissed *employees*.”

[13] Mr Rautenbach, invoking section 189(2)(a)(iv), argued that the appellant was entitled to be consulted on the adverse effect of her dismissal. Accordingly he contended that the aim of the consultation process envisaged in the section was designed to enable appellant to influence the outcome materially so that she could, if possible, obtain employment with the new contractor, BSW or be placed in a position where she would enjoy a reasonable chance of receiving or obtaining an alternative position. The process of consultation could not be fair if it focussed the employee’s mind on a decision to restructure in a manner which created the impression that the employee would obtain a job only to learn thereafter that no such job was indeed available.

[14] With regard to the facts of the present case, Mr Rautenbach submitted that the parties had been consulted initially about the decision to outsource EBIZ and they had accepted this decision in the belief that they would obtain employment with BSW. It had been suggested that a total of some fifty jobs would become

available with BSW. Circumstances then changed materially when difficulties pertaining to the conclusion of contracts between BSW and respondent were encountered. The absence of sufficient contracts by which BSW would have obtained business from respondent destroyed the premise upon which the initial acceptance by employees of EBIZ for the principle of outsourcing had been predicated. When it became clear to respondent, at the very latest by 14th August, that far fewer jobs would become available because of the absence of contracts concluded between BSW and respondent, a detailed process of consultation should have been initiated with the affected employees in order that respondent comply with its obligations in terms of section 189(2) of the Act.

- [15] In support of the submission that the entire consultation had been predicated on a significant amount of jobs being offered by BSW to EBIZ personnel, Mr Rautenbach referred to the following passage from the evidence of appellant: “In die stadium wat (sic) die onderhandelings wat u by betrokke was, was daar sprake van onderhandeling oor hoeveel mense, hetsy 59 of dan 10, BSW moes oorneem? Ja nee die onderhandeling was nog die hele tyd gewees dat om en by 50 van BSW, agt van EBIZ se mense is wat sou oorgaan. Daardie mense wat nie in Sanlam geabsorbeer is nie, sou almal oorgaan. Dit is nog wat die onderhandelinge oor was.” Once it had become clear that there were difficulties relating to the conclusion of contracts which would allow this ‘expectation’ to be implemented, respondent was obliged but failed to inform the affected employees about these difficulties in the negotiations and the possibility that their expectations would be dashed.

[16] Mr Rautenbach also criticized the nature of the information which had been provided to employees including appellant. While the impression had been created as from 14 August 1998 that the BSW transaction had failed to deliver the positions initially expected, Mr Botha of respondent testified that so far as communications to this effect were concerned the following was the position: “Wat was die graad van finaliteit van die kommunikasie wat gemaak is by daardie vergadering en ek wil dan vir u vra om dit te antwoord met spesifieke verwysing en kom ons gaan maar na 105 toe groep A, is hy finaal bepaal of nie? -Nee ek dink die kern is, dit was die status op daardie stadium en dit was die mense se name wat beskikbaar was.

Was groep B finaal bepaal? -Nee ook nie. Daar was nog onderhoude. Ek weet selfs later was daar onderhoude ook.

Was groep C klaar finaal bepaal? -Nee C was die res. So dit wat nie by die ander, as die ander nie vas is nie, dan sal C ook nie vas wees nie.”

[17] Mr Rautenbach submitted that the clear impression created by the information which had been provided to appellant as at 14 August 1998 was inaccurate. Mr Botha admitted the process had not yet been completed by that date and accordingly appellant had effectively been misled. Had she known that the negotiation process was not yet completed she could have pursued the possibility of negotiating with another information technology partner instead of BSW as the contractor, or pursued her suitability in addition to or in preference to an incumbent at BSW, or sought to solve the problem relating to the adequacy of contracts concluded with BSW which would be sufficient to sustain the ‘EBIZ business’ now conducted by BSW.

[18] For these reasons Mr Rautenbach submitted that respondent failed to consult with appellant about measures to mitigate the adverse effects of dismissal. It did not consult about any eventuality which would occur if the initial plan did not materialise and it failed to inform appellant as to the exact nature of the negotiations between 14 to 18 August.

Analysis

[19] Consultation as envisaged in section 189(2) is a continuous process between the parties. It was not sufficient in order to comply with the obligations contained in section 189(2) for respondent simply to consult with employees of EBIZ as to the decision to transfer key elements of the business to BSW. There was an obligation to ensure that employees were properly informed of the nature of the negotiations with BSW insofar as the outcome of these negotiations affected

attempts to reach a consensus on the avoidance of dismissals, the minimisation of dismissals or the mitigation of the adverse effects of dismissal.

[20] In the present case appellant had access to considerable information. In my view she was either possessed of the requisite information throughout the negotiation process or she was in a unique position to acquire such knowledge. It is clear from the evidence that numerous meetings were held with EBIZ personnel. On 14 July 1998 the respondent replied to concerns from 26 members of BSW as to the effects of the proposed outsourcing and invited further proposals. On 24 July 1998 a meeting was held with EBIZ personnel who were informed of the division of EBIZ employees into three groups including the “oortollige lys”. Throughout this period appellant was a member of the project team which had negotiated with BSW. She had moved into BSW’s premises and was well placed to be informed as to the state and nature of the negotiations including the possibility of conclusion of contracts with respondent, a critical aspect in the decision of BSW to employ EBIZ personnel.

[21] Although she did not attend the key meeting on 14 August 1998 her superior Holtzhausen, with whom she had a sufficiently close relationship for the latter to offer her employment in his new enterprise, telephoned her to advise that the BSW transaction had fallen through and that she had been placed on the ‘oortollige list’. Given their relationship, it is inconceivable that appellant would not have not been able to request further information from Holtzhausen as to the reasons why the “deal” had not been concluded. To plead ignorance as she did during her testimony, is to cast doubt upon the accuracy of her entire account of these events.

[22] Under cross examination appellant conceded that she had clear knowledge of the significance of the conclusion of contracts between respondent and BSW:

“En dit is die 31ste van die sewende maand. So die eerste punt dan, u is reeds ten laaste op daardie dag dan nou bewus van die feit dat, die *sluit* van kontrakte kardinaal is, die fondasie van hierdie hele transaksie sou wees? -**Ek weet dit van die begin af**”. (my emphasis).

[23] In essence appellant would have the court believe that she was not provided with sufficient information or afforded adequate opportunity to put alternative proposals to respondent. But this version cannot be accepted. She was a member

of the project team which negotiated with BSW, she was the project team member responsible, *inter alia*, for personnel of EBIZ, she was privy to all the documentation to which reference has already been made, she had contact with Mr Holtzhauzen and was able to obtain information regarding the difficulties experienced in concluding contracts with BSW. Further she knew that the conclusion of contracts was crucial to the number of employees who would be taken over by BSW. There is no basis for a conclusion that she was provided with inadequate information so that she was prevented or disabled from engaging in a proper process of consultation with respondent. Certainly she failed to testify as to exactly what she was informed by BSW or the respondent. In these circumstances it is impossible to make a finding as to the respects in which the consultation process broke down or was discontinued by the respondent.

[24] The process of consultation envisaged in section 189(2) involves a bilateral process in which obligations are imposed upon both parties to consult in good faith in an attempt to achieve the objectives specified in the section. In my view the respondent fulfilled its obligations in terms of section 189(2). If any conclusion is justified, it is that appellant failed to engage adequately in the consultation process envisaged in the section. Accordingly it cannot be said that the retrenchment of appellant was procedurally unfair.

Costs

[25] In terms of rule 9(3)(a) of the Rules of this Court, heads of argument of appellant and respondent must include a chronology of the material facts to avoid dismissal or mitigate the effects thereof. In this case no detailed chronology was made available by either counsel (although respondent's counsel attempted to do so) and this made the task of identifying the material facts particularly difficult.

Furthermore I consider it to be my unfortunate task to draw attention to the unsatisfactory manner in which this case was conducted in the trial court. Instead of witnesses providing the court with a clear and coherent account of the relevant events, documents were placed before witnesses who were then usually asked merely to discuss or comment on the contents thereof. As a result of the manner in which key evidence was presented, it has proved to be an extraordinarily difficult task to follow the chronology of events or to gain any clarity at all on what really occurred. It is arguably this difficulty which explains counsels non-compliance with Rule 9(3)(a).

[26] For these reasons I consider it appropriate that no order as to costs be made both in this Court or in the Court *a quo* - itself a clear mark of this Court's displeasure with the manner in which the entire process of this litigation was conducted.

[28] The appeal and the cross-appeal are dismissed.

DAVIS AJA

I agree.

ZONDO JP

I agree.

GOLDSTEIN AJA

For the Appellant: N.F. Rautenbach
instructed by Balsillies Inc.

For the Respondent: H.C. Niewoudt of Deneys Reitz Inc

Date of Hearing: 28 November 2000

Date of Judgment: 14 December 2000.