



THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA 18/2014

STANDARD BANK OF SOUTH AFRICA LTD

Appellant

and

ANGELINA LETSOALO

Respondent

Heard: 10 November 2015

Delivered: 27 July 2016

Summary: Dismissal for operational requirements – procedural fairness – section 189 of the Labour Relations Act – proper consultation – what constitutes – whether rejection of alternative position by employee coupled with an alternative salary proposal constituting a counter offer – employer not responding thereto – whether conduct by employer rendered the dismissal procedurally unfair.

Coram: Tlaetsi DJP, Musi JA et Makgoka AJA

JUDGMENT

MAKGOKA AJA

- [1] The issue in this appeal is whether the employer consulted properly with an employee before dismissing her for operational reasons. The appellant appeals against the whole judgment and order of the Labour Court delivered

on 2 October 2013, in terms of which the dismissal of the respondent (Ms Letsoalo) due to operational requirements, was held to be procedurally unfair. The appellant appeals against that finding, with leave of the Labour Court, granted on 6 March 2014.

- [2] Ms Letsoalo was employed by the appellant on 20 September 2010 as a provincial foreign exchange manager. She was based at the appellant's office in Mpumalanga Province. She reported directly to Mr Andre Jonker, (Mr Jonker) the appellant's provincial sales manager. Due to the worsening economic climate, Ms Letsoalo's position was one of those identified as non-critical by the respondent. She was a member of South African Society of Bank Officials (SASBO) a representative trade union at the appellant's work place.
- [3] Prior to embarking on the retrenchment process, the appellant consulted with SASBO regarding possible dismissals due to operational requirements. An agreement was reached on the procedure that needed to be followed regarding the issue. In terms of that agreement, all employees identified as occupying non-critical positions were to be placed on informal redeployment for six months. If a suitable position was not identified during that period, the employees would be placed on an informal redeployment process for two months. If there were still no suitable positions available, the employees would be issued with letters of termination at the beginning of April 2012, with their services to terminate on 30 April 2012.
- [4] In the Mpumalanga Province, where Ms Letsoalo was based, four positions, including hers, were identified as non-critical. Subsequent to the consultation with SASBO, the appellant consulted individually with the affected employees, including Ms Letsoalo, pursuant to the agreement with SASBO. The consultation with Ms Letsoalo was done through Mr Jonker. She applied for various positions, but was unsuccessful in each of them. On 23 April 2012, she was offered a position with the appellant's business banking section as account analyst. She rejected the offer on 26 April 2012 and eventually, on 30 April 2012, she was dismissed for operational requirements. I will deal in full

with the circumstances in which she rejected the offer, as those circumstances are relevant to the outcome of the appeal.

- [5] As a result of her dismissal, Ms Letsoalo referred an unfair dismissal dispute to the Labour Court, challenging both the substantive and procedural fairness of her dismissal by the appellant. Substantively, she alleged that the appellant had failed to comply with the provisions of s189 of the Labour Relations Act 66 of 1995 (the LRA) in that she was not consulted by the appellant prior to her dismissal. She further alleged that the dismissal was procedurally unfair because the consultation process was not followed.
- [6] The trial took place from 3–6 June 2013 in the Labour Court before Molahlehi J. Despite some initial contentions by Ms Letsoalo's legal representative that the substantive fairness of the dismissal was also in dispute, the issue was eventually not pursued, and the sole issue was whether the dismissal was procedurally fair, and in particular, whether the appellant had properly consulted with Ms Letsoalo before her dismissal. This position is also confirmed by the minute of a pre-trial conference held by the representatives of the parties on 29 November 2012.
- [7] Only Mr Jonker, on behalf of the appellant, and Ms Letsoalo, testified during the trial. Much was common cause between the parties. What became of critical importance is the alternative position offered by the appellant to Ms Letsoalo. Mr Jonker testified that once Ms Letsoalo's position was identified as non-critical, he engaged with Ms Letsoalo over a period of eight months, including assisting her to find other employment both internally and with other retail banks. He pointed out that because Ms Letsoalo was a specialist in the foreign exchange, she lacked in other skills. It was not easy to find alternative employment for her. During 2012, a position of a banking accounting analyst was identified and offered to her, in a letter dated 23 April 2012. Had she accepted the position, she would have commenced her duties on 1 May 2012. If she did not, her last day in the employ of the appellant was to be 30 April 2012.

- [8] However, that position was at a lower grade than that occupied by Ms Letsoalo at that stage. At the time of the retrenchment, her salary was R453 737 per annum. The alternative position offered was at the salary of R379 484. Initially Ms Letsoalo's calculation was that if she accepted the position, she would be required to take a salary reduction of R7 000 per month, while she was only prepared to take a salary reduction of no more than R4 000 per month. A meeting was held on 24 April 2012 between Mr Jonker and Ms Letsoalo. The meeting was also attended by Ms Tandiwe Dlamini (Ms Dlamini), who was the appellant's provincial human resources consultant.
- [9] During that meeting, it was agreed that Ms Letsoalo's calculations on the salary reduction of R7 000 per month was erroneous, and that the correct figure for her salary reduction was R5 628 per month. Subsequent to that meeting, Ms Dlamini wrote an e-mail to Ms Letsoalo recording the outcome of the meeting, and explained to Ms Letsoalo that the offer of the position of account analyst was at the maximum in the relevant band and that the appellant could not offer her anything more. She was invited to indicate her acceptance of the offer by noon on 25 April 2012, failing which the appellant would proceed with the retrenchment. Ms Letsoalo responded to Ms Dlamini's e-mail the same day, 25 April 2012, as follows:
- 'Due to the fact that there were (sic) of Grade 11 in the Province and I was never given the opportunity to prove myself, and yet you (are) offering me the role of 'Account Analyst' which I understand you are trying to assist and at this point in time I am prepared to take whatever position you (are) offering for as long as I will be comfortable to do (and I am sure with the good support, coaching I will definitely do well). But my problem is that I cannot accept any offer which is less with +-R7 000 from my current salary as it will really have a huge financial impact which will definitely affect me badly. I take note that you are trying to assist , and it is because of that why (sic) I'm requesting you not to cut my salary with R7 000 but with R4 000'.
- [10] Ms Dlamini responded to Ms Letsoalo's e-mail, still on 25 April 2012, emphasising that there were guidelines to follow regarding salary grades which the appellant was not at liberty to ignore, and go against. She enquired

from Ms Letsoalo whether she would be accepting the offer by noon of that day, or whether she should proceed with the retrenchment. At 11h19, Ms Letsoalo indicated in a return e-mail to Ms Dlamini that she was not accepting the position because of the R7 000 salary deduction she would have to take if she accepted the position. She further stated that:

'I am not accepting this salary cut of R7 000, and it is so unfortunate that I will have to take the matter further to seek for external assistance...'

[11] Another meeting was convened by Mr Jonker with Ms Letsoalo to discuss the matter further, which Ms Dlamini also attended. During that meeting, the package of the position offered to Ms Letsoalo was explained to her, as it was Mr Jonker's view that her calculations as to the salary reduction were erroneous. A detailed breakdown of the package was drafted and presented to Ms Letsoalo. It was also made it clear that the offer was at the maximum of the band and that the appellant could not offer her more as the salary grades were regulated by the appellant's company guidelines. Notwithstanding the above, Ms Letsoalo declined the position through an e-mail dated 26 April 2012, on the basis that it required of her to take a salary reduction of R5 628 per month. She suggested that her salary cut be no more than R3 311 per month. There was no response by the appellant to Ms Letsoalo's e-mail.

[12] Mr Jonker further testified that on 27 April 2012, he telephonically endeavoured to persuade Ms Letsoalo to accept the offer as he was of the view that she would receive much needed exposure and experience, which would have stood her in good stead when she later applied for other positions internally with the appellant. Mr Jonker's efforts came to nought as Ms Letsoalo persisted in her rejection of the offer. She was accordingly retrenched on 30 April 2012.

[13] In her testimony, Ms Letsoalo stated that there was no need for the appellant to do away with her position. According to her, the position should rather have been aligned to other business units. With regard to the alternative position, she testified that she rejected it because of the reduction in salary. During cross-examination, she stated that she rejected the offer as a matter of

principle because she felt that the appellant had not followed the correct procedure. Much of her testimony introduced new issues which were not canvassed with Mr Jonker during cross-examination.

[14] The Labour Court handed down its judgment on 2 October 2013, in which it rejected Ms Letsoalo's contention that she was never consulted by the appellant. However, the Labour Court found that Ms Letsoalo's dismissal was procedurally unfair on the basis that she had not completely rejected the offer of alternative position made to her. For that reason, the Labour Court ordered the appellant to compensate Ms Letsoalo in the amount equivalent to 12 months, calculated at the salary that she received at the time of the dismissal.

[15] In arriving to that conclusion, the Labour Court reasoned that Ms Letsoalo's response to the offer of alternative employment, in which she declined the offer on a salary reduction of R5 628.18 per month, and proposed instead a salary reduction of R3 311 per month, could not be regarded as an outright rejection, but rather as a counter-proposal. The Labour Court made a finding that there was no evidence that the appellant had considered the counter-proposal. It also pointed out that the formal notice period given to Ms Letsoalo was less than 30 days which had been promised to her. It concluded, however that, failure in this regard was not "serious enough" to warrant a conclusion that there was a defect in the procedure.

[16] The Labour Court then concluded thus:

'In relation to the offer of the alternative employment, I found that the employee did not necessarily reject the offer but made an alternative proposal which the respondent failed to consider. The failure by the respondent to consider the counter-proposal by the applicant, in my view, has an impact on the procedural fairness of the dismissal. The issue that then arises is whether the failure to consider the alternative proposal made by the applicant is serious enough to warrant the maximum compensation for the unfairness of the procedure. In my view, that failure to consider the proposal is serious and but for the fact that the substantive fairness was not in issue, this would have had a serious impact on the substantive fairness had it remained an issue for

consideration...In light of the above, I find that the respondent should for that reason be ordered to pay the maximum compensation.'

[17] In this Court, the appellant relies on two grounds for its contention that the Labour Court erred in its conclusion. The first ground is that the basis on which the Labour Court premised its conclusion, i.e. that the appellant had not considered Ms Letsoalo's counter-offer, was never pleaded, nor relied on by Ms Letsoalo in her statement of case and during her evidence. According to the appellant, it was never called to answer such a case, and as such, it was prejudiced because the Labour Court went beyond the scope of the pleadings and the evidence in coming to its conclusion. The second ground is that the Labour Court's conclusion that Ms Letsoalo did not completely reject the offer but made a counter-offer, is in any event, not supported by the evidence.

[18] I find it convenient to consider the second ground first, as it is, in my view, potentially dispositive of the appeal. But before I do so, it is prudent to set out the legislative framework governing dismissals. Such framework finds expression, among others, in two sections of the LRA, namely ss 185 and 189. The former confers on every employee, a general right not to be dismissed unfairly, while s189 pointedly governs dismissals for operational requirements. In terms of s189(1), the employer is required to engage employees or their representatives, depending on the circumstances, in a consultation process when it contemplates dismissals based on its operational requirements. Section 189(2)(a)(i) enjoins the employer and the employees or their representatives to attempt to reach consensus on appropriate measures to avoid the contemplated dismissals. Section 189(3)(b) requires the employer to disclose to the other consulting party in writing the reasons for the proposed dismissals and "the alternatives that the employer considered before proposing the dismissals and the reasons for rejecting each one of those alternatives."

[19] I turn now to consider whether Ms Letsoalo's e-mail dated 26 April 2012 constituted a counter-offer. This is essentially an enquiry as to whether there was proper consultation. It involves a factual enquiry. As to how that enquiry is to be undertaken, two well-settled principles must be applied. The first is that

courts will not assist employees who refuse to accept reasonable alternative positions.¹ The second is that courts will not find against employers who provide a reasonable explanation for not accepting alternatives proposed by employees or their trade unions.² Therefore, in the context of the present case, it must be determined (a) whether Ms Letsoalo refused to accept a reasonable alternative position, and (b) whether the appellant provided a reasonable explanation for not accepting the alternative remuneration package proposed by Ms Letsoalo.

[20] It is common cause that the appellant did not respond to Ms Letsoalo's e-mail of 26 April 2012, and that the appellant proceeded with the retrenchment process. According to the Labour Court, this demonstrates that the retrenchment occurred without the appellant considering her "counter-offer". On that basis, the Labour Court found that the dismissal was procedurally unfair. It appears that the Labour Court ignored the background and context of Ms Letsoalo's e-mail. It was preceded by intensive engagement between her and the appellant (represented by Mr Jonker). Sight should not be lost of the fact that the alternative position offered to Ms Letsoalo was two grades lower than the one she held. It was a demotion. Necessarily therefore, a substantial reduction in salary was inevitable. It was explained to her repeatedly by Mr Jonker and Dlamini that the salary that was offered for the lower position was the highest in that band, and there was no way the salary could be increased if she accepted the position.

[21] Two meetings were held in this regard where the point was made clear to her. After each meeting, she made her position very clear that she was not prepared to accept a salary reduction beyond a particular threshold. By 26 April 2012, it was clear that the parties held irreconcilable views on the matter. It would therefore have been an exercise in futility, and served little or no purpose, had the appellant reverted to Ms Letsoalo as to its final decision. In all circumstances, the answer to what the Labour Court deemed to be a counter-proposal, was a foregone conclusion: the appellant would have simply

¹¹ *Wanda and Others v Toyota SA Marketing, a Division of Toyota SA Motors Ltd* [2003] 2 BLLR 224 (LAC).

² *SACCAWU and Others v Wimpy Aquarium* [1998] 9 BLLR 965 (LC).

reiterated its earlier position that there was nothing more it could offer in terms of salary to Ms Letsoalo in the alternative position.

- [22] The context in which the offer was made, and responded to, must be borne in mind. It is this: The appellant was experiencing financial difficulties. The appellant's final position had been conveyed clearly and unequivocally to Ms Letsoalo. Under those circumstances, it is difficult to see what difference it would have made, had the appellant responded to Ms Letsoalo's e-mail. Had there been a response, it would predictably have been to reiterate the appellant's position, which had been conveyed to her previously. In all circumstances, Ms Letsoalo cannot tenably suggest that she does not know the reason why the appellant proceeded with the retrenchment without responding to her e-mail of 26 April 2012. The Labour Court did not address this aspect. At the risk of repetition, the reason was provided to her repeatedly during the process of consultation, as fully set out in the paragraphs above.
- [23] In the context of the matter, the appellant's reason for not responding to Ms Letsoalo's e-mail is self-evident. It is unlikely that the representations of Ms Letsoalo would have dissuaded the appellant otherwise, given the virtual breakdown in the consultation process. The law requires consultation, not futile engagements. As this Court explained in *SACTWU and Another v Discreto (a Division of Trump & Springbok Holdings)*,³ the function of a court in scrutinising the consultation process is not to second-guess the commercial or business efficacy of the employer's ultimate decision, but to pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham.
- [24] In the present case, far from being a sham, the consultation process engaged by the appellant was genuine and *bona fide*, geared to minimise the impact of the retrenchment on Ms Letsoalo. Therefore, by concluding that the dismissal was procedurally unfair simply because there was no response to Ms Letsoalo's e-mail, despite extensive and exhaustive consultations that preceded it, the Labour Court, in my view, placed form above substance. The

³ [1998] 12 BLLR 1228 (LAC).

appellant, in particular Mr Jonker, did everything it could to assist her and to comply with its obligations in terms of s189 of the LRA.

- [25] Ms Letsoalo was clearly ill-advised, and unreasonable, in rejecting what plainly was a reasonable offer, in the circumstances. I agree with the contention by Mr Cithi, attorney for the appellant, that Ms Letsoalo's conduct in rejecting a reasonable offer was at variance with the notion of joint consensus-seeking process as envisaged in s189 of the LRA. Therefore, unlike the Labour Court, I conclude that Ms Letsoalo's conduct, under the particular circumstances of the case, constituted an unequivocal rejection of the offer of an alternative position, and not a counter-offer.
- [26] This conclusion deems it unnecessary to consider the appellant's contention that the issue of counter-offer and non-consideration thereof was not pleaded, and therefore the Labour Court should not have considered it. But it appears that the appellant is wrong in this regard. Ms Letsoalo has been unfortunate to have been assisted by less than competent people. Her statement of case is not a model of clarity or elegance. It is an incoherent hand-written document, from which it is not clear what the issues are. However, during the trial, it became clear that the issue of the counter-offer was canvassed, thus enlarging the issues. It is trite that the court has inherent jurisdiction to decide a matter even where it has not been pleaded, provided that such matter was ventilated before it.⁴
- [27] In the circumstances, the appeal must be allowed. The Labour Court's order must be replaced with an order dismissing Ms Letsoalo's application. With regard to costs, I bear in mind that the awarding of costs in labour disputes is governed by the requirements of law and fairness in terms of s162 of the LRA. The rule of practice that costs follow the result therefore does not govern the making of costs orders in labour disputes. See in this regard *MEC for Finance, Kwazulu-Natal and Another v Dorkin N.O. and Another*.⁵ The requirements of law and fairness are on equal footing, and none is secondary to the other. See

⁴ *Shill v Milner* 1937 AD 101 at 105; *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (AD) at 433; *Van Mentz v Provident Assurance Corporation* 1961 (1) SA 115 (A) at 122; *Robinson v Randfontein Estates, G.M. Co Ltd.*, 1925 A.D. 173 at 198.

⁵ (2008) 29 ILJ 1707 (LAC); [2008] 6 BLLR 540 (LAC) at para 17.

in this regard *Xaba v Portnet Ltd.*⁶ In the present case, the successful appellant is a corporate entity against an individual employee who is not supported by a trade union.

[28] In *Lewis v Media 24 Ltd*,⁷ it was observed that the Labour Court has generally been reluctant to order costs against an individual employee. Indeed, there is an unambiguous trend in the judgments of the Labour Court, this Court and the erstwhile Appellate Division, in which those Courts have declined to make costs orders against unsuccessful individual litigants not supported by trade unions, first, because of their vulnerable financial position, and second, because a costs order may deter similarly placed individuals from approaching the courts.⁸

[29] I therefore consider that the requirements of law and fairness dictate that no order should be made regarding the costs of appeal.

[30] The following order is made:

1. The appeal succeeds;
2. The order of the Labour Court made on 2 October 2013 is set aside and in its stead the following is substituted for it:

‘The applicant’s claim of procedural unfairness regarding her dismissal is dismissed. There is no order as to the costs’
3. There is no order as to the costs of the appeal.

⁶ (2000) 21 IJL 1739 (LAC).

⁷ *Lewis v Media 24 Ltd* (2010) 31 2418 (LC) at para 129.

⁸ *NUM v East Rand Gold & Uranium Co. Ltd* (1991) 12 ILJ 1221 (A); *Malandosh v SABC* (1997) 18 ILJ 544 (LC); *Value Logistics v Basson and Others* (2011) 32 ILJ 2552 (LC); *University of Pretoria v CCMA and Others* (2012) 33 ILJ 183 (LAC); *Nombakuse v Department of Transport & Public Works: Western Cape Provincial Government* (2013) 34 ILJ 671 (LC).

T.M. Makgoka

Acting Judge of the Labour Appeal Court

Tlaletsi DJP and Musi JA concur in the judgment of Makgoka AJA

APPEARANCES:

FOR THE APPELLANT: Mr D. Cithi of Mervyn Taback
Inc. Parktown, Johannesburg

FOR THE RESPONDENT In person