



REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 1326/2011

In the matter between

MOTOR INDUSTRY STAFF ASSOCIATION

First Applicant

ALLAN DESMOND BEZUIDENHOUT

Second Applicant

and

STANMAR MOTORS (PTY) LTD

First Respondent

Motor Industry Bargaining Council

Second Respondent

BOTHA DU PLESSIS N.O

Third Respondent

Heard: 28 June 2012

Delivered: 22 August 2012

Summary: The arbitrator's award is reviewed and set aside as it is unreasonable. The employer's failure to comply with a written

collective retrenchment agreement and failure to re-employ the employee amounts to an unfair labour practice in terms of section 186 (2) (c) of the LRA. The employer ordered to re-employ the employee.

JUDGMENT

DOSIO AJ

Introduction

- [1] This is an application to review the award of the third respondent (the “arbitrator”) dated 7 May 2011, issued under the auspices of the second respondent (“MIBCO”) under case number MICT 9639, where the arbitrator found that the first respondent (the “employer”) did not commit an unfair labour practice in terms of section 186 (2) (C) of the Labour Relations Act (The “LRA”).¹
- [2] The applicants request this Court to find that the employer breached the terms of a written collective retrenchment agreement (the “written agreement”), concluded between the second applicant (“Mr Bezuidenhout”) and the employer on 15 January 2010, by failing to offer and re-employ Mr Bezuidenhout one of the three sales manager positions that became available during the 12 month period, thereby resulting in an unfair labour practice as contemplated in section 186 (2) (c) of the LRA.
- [3] The applicants request the re-employment of Mr Bezuidenhout, in any of the

¹ 66 of 1995.

three sales manager positions that became available, alternatively, that 12 months compensation, be paid to Mr Bezuidenhout by the employer for committing the said unfair labour practice.

- [4] I am satisfied that the applicants have given an adequate explanation for not complying timeously with rule 7A(6) and 7A (8) and for the late filing of the review application.
- [5] The Court finds that the delay is not excessive bearing in mind that the transcript was incomplete and that there were delays in obtaining the completed record.
- [6] Since there are excellent prospects of success, condonation is granted.

Background facts

- [7] The employer is a national dealer in Mercedes Benz vehicles. Mr Bezuidenhout started working for the employer in 1997. On 1 April 2008, Mr Bezuidenhout was appointed by the employer as the branch manager/pre-owned sales manager of its Knysna branch.
- [8] The branch in Knysna closed at the end of January 2010 due to economic reasons, and the employer commenced with retrenchment consultations in respect of all the employees employed there. The employer had another branch in George.
- [9] On 15 January 2010, the first applicant, the Motor Industry Staff Association ("MISA"), a registered trade union, of which Mr Bezuidenhout is a member, concluded a written agreement with the employer. Clause 9 stated that 'The Company shall guarantee re-employment for a period of 12 (twelve) months should a position become available and should the affected member qualify for such position'.

- [10] Mr Bezuidenhout informed the employer on 15 January 2010 that he accepted the said severance package and notice pay.
- [11] On 19 January 2010, the employer furnished Mr Bezuidenhout with a retrenchment notice which confirmed Mr Bezuidenhout's decision to accept the retrenchment package, and confirming that his name would remain on a priority list for the next 12 months should a suitable position become available.
- [12] During the arbitration hearing, it was confirmed by Mr Orson Samuel ("Mr Samuel"), that there was no position available for Mr Bezuidenhout at the George branch at the time of his retrenchment.
- [13] Mr Bezuidenhout's last working day was 31 January 2010. He was 50 years old and his cost to company was R32151-00 *per month*.
- [14] It is common cause that at least four positions at the George branch became available after Mr Bezuidenhout's retrenchment during the 12 month period. The four positions were: Dealer principal, sales manager- Mercedes, pre-owned sales Manager, and general sales manager.
- [15] It is common cause during the arbitration hearing that none of the four positions were advertised by the employer.
- [16] During the hearing, the employer disputed that Mr Bezuidenhout was qualified for the position of dealer principal, but did not dispute Mr Bezuidenhout's eligibility for being considered for the other three sales manager positions.
- [17] The employer's excuse or defence for not offering any of the said sales manager positions to Mr Bezuidenhout was that its CEO, Mr Owen Smith (" Mr Smith"), had twice verbally offered two positions to Mr Bezuidenhout, and on both occasions, Mr Bezuidenhout showed no interest in the said positions offered to him.

- [18] Mr Bezuidenhout testified that, on 22 January 2010, Mr Smith informed him that he wanted to keep him at Stanmar Motors. In February 2010, Mr Smith again told him he wanted him back. However, Mr Smith did not get back to him on either of the two occasions. Mr Bezuidenhout was aware there were no managerial positions available at the time of these two conversations with Mr Smith. Due to there being a written agreement guaranteeing re-employment within the 12 month period and due to the fact that Mr Smith had said he would get back to him, Mr Bezuidenhout did not approach Mr Smith.
- [19] Mr Smith testified that he would have liked Mr Bezuidenhout to run the Mitsubishi department or the Chrysler department as sales manager. Mr Bezuidenhout did not respond on 22 January 2010 and showed no interest when he offered the same positions to him in February 2010. The dealer principal of George, Mr Bles de Wet resigned on 25 February 2010, but no further offers were made to Mr Bezuidenhout. Mr Smith disagreed that he had stated he would get back to Mr Bezuidenhout on any of the aforesaid "offers".
- [20] It is common cause that at the time of the said two discussions between Mr Smith and Mr Bezuidenhout, Mr Daan Du Toit was still employed as the sales manager of the Mitsubishi department and Mr Malan Gericke was still employed as the sales manager of the Chrysler Department. When Mr Bles de Wet resigned, which was still in the twelve month period, a new dealer principal was appointed.

The arbitrator's award

- [21] Against this background, the arbitrator came to the conclusion that the employer understood Mr Bezuidenhout not to be interested in the positions offered to him and that Mr Bezuidenhout had made no effort to contact the employer confirming his interest in the said offers. Accordingly, the employer was justified not to offer any further positions which became available. Had Mr Bezuidenhout been keen to remain with the employer, the arbitrator found, he would not have accepted the

severance package and would have considered the job offers. Although there were no details of the job offer, the employee should have enquired about the specifics. The employer only had to notify the employee when suitable vacancies became available. If the CEO had 'promised' him a position it could be regarded as a job offer, even with little details. The arbitrator found that Mr Bezuidenhout was not interested in any position bar the dealer principal position. The arbitrator disagreed with Mr Bezuidenhout that he was indeed qualified to occupy the position of dealer principal.

The grounds of review

- [22] The applicants state the arbitrator committed a misconduct or alternatively an irregularity by finding there was no duty on the employer to offer positions to Mr Bezuidenhout every time such a suitable position became available. The arbitrator issued an unreasonable award, as he did not resolve the factual dispute which arose between the conflicting versions of Mr Bezuidenhout and Mr Smith as to what was said during the meetings held on 22 January 2010 and during February 2010. The arbitrator's finding that Mr Bezuidenhout was not interested in any other position than the dealer principal position, rendered the award reviewable. The arbitrator erred in his reasons as to why Mr Bezuidenhout accepted the retrenchment package and misunderstood the applicant's case. The arbitrator failed to apply the correct principles of law.

Evaluation

- [23] The court finds that the arbitrator failed to apply his mind and committed an irregularity by finding that the employer had no duty to offer positions to Mr Bezuidenhout. The written agreement clearly placed an *onus* and duty on the employer, in clear and unambiguous terms, to offer Mr Bezuidenhout, any and every suitable position for which he was qualified, during the 12 month period. According to the written agreement there was no obligation on Mr Bezuidenhout to contact the employer advising him of his interest should any suitable vacancy

become available for which he was suited. The arbitrator asked the wrong questions by asking Mr Bezuidenhout if he had applied for any of the sales manager positions, or whether Mr Bezuidenhout had reminded the employer that he was still interested. In the case of *Stocks Civil Engineering (Pty) Ltd v RIP NO and Another*,² Van Dijkhorst AJA in the minority judgment, stated that if ‘the tribunal “asked itself the wrong question” or “applied the wrong test” or “based its decision on some matter not prescribed for its decision” or “failed to apply its mind to the relevant issues in accordance with the behests of the statute”. Such decision is reviewable’.

[24] The arbitrator committed a misconduct and irregularity by failing to resolve the factual dispute arising from the conflicting versions given by Mr Bezuidenhout and Mr Smith in respect to what was said during the meetings held on 22 January and during February 2010. The arbitrator merely found that the employer had offered Mr Bezuidenhout a position and Mr Bezuidenhout had shown no interest, which led the employer to believe Mr Bezuidenhout was not interested. There is no explanation by the arbitrator how he reached this conclusion. The arbitrator should have rejected the version of Mr Smith for the following reasons;

1. The employer’s letter dated 19 January 2010 clearly confirmed to Mr Bezuidenhout that there was no alternative position available to save his retrenchment.
2. There was no position on 22 January 2010 or during February 2010 which Mr Smith could have offered Mr Bezuidenhout. This was confirmed by Mr Samuel.

The arbitrator stated that there were no specific details of the job offers, but that Mr Smith could create positions. If Mr Smith was going to create another position for Mr Bezuidenhout, it would not have been sales manager of Mitsubishi or Chrysler but something else. This suggests the arbitrator made a mistake in

² (2002) 23 ILJ 358 (LAC).

coming to the conclusion that Mr Bezuidenhout did not want to return at that stage, or was not keen to take any job offer. Mr Bezuidenhout could not accept an offer which was not specific and reduced down to writing. Neither could he return to something which was not available. Mr Smith confirmed during the hearing that the meeting in February 2010 was not for a job offer or an interview. On this evidence alone, the arbitrator should have rejected the evidence of Mr Smith that two job offers had been made. Even if the arbitrator believed that a position was offered to Mr Bezuidenhout for acceptance, and Mr Bezuidenhout showed no interest, it did not absolve the employer from its contractual obligation to offer any further suitable position which became available. The arbitrator failed to make a finding whose version was correct. As *per* the transcript of the arbitration hearing, it is common cause Mr Bezuidenhout had indicated to Mr Samuel that if a position became available at Stanmar Motors, he would have been interested. The arbitrator should have accepted the version of Mr Bezuidenhout and rejected the version of Mr Smith.

3. There were conflicting versions between Mr Samuels and Mr Smith, in that Mr Samuel testified he was not aware of the two job offers being offered to Mr Bezuidenhout, whereas Mr Smith's evidence was that two job offers had been made. On a preponderance of probabilities, the arbitrator should have rejected Mr Smith's version and found in favour of Mr Bezuidenhout that no specific job offer had been made.

[25] It is accepted that an arbitrator's prime function should be to ascertain the truth as to conflicting versions placed before him or her. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*³, Ngcobo J stated at 268:

'Where a commissioner fails to have regard to the material facts, the arbitration proceedings cannot, in principle, be said to be fair because the commissioner fails to perform his or her mandate. In so doing, in the words of Ellis the commissioner's action prevents the aggrieved party from having its case fully and

³ (2007) 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC).

fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings, as contemplated by s 145 (2) (a) (ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings’

‘The same considerations apply to a commissioner who fails properly to resolve an irreconcilable dispute of fact. For these reasons, the commissioner’s award falls to be reviewed and set aside.’

- [26] In addition, an arbitrator should assess the credibility of the witnesses called, and consider the inherent probabilities or improbabilities of the versions proffered by the witnesses. (See *Sasol Mining (Pty) Ltd v Ngqeleni NO and Others* 2011ILJ 723 (LC) at 727). It is clear the arbitrator did not do this.
- [27] The arbitrator applied the incorrect principles of law by finding that even if no details of the position “offered” had been given to Mr Bezuidenhout during the two meetings held in January and February 2010, it still amounted to a job offer. For an offer to constitute a valid “offer”, the offer must be precise and contain sufficient detail, failing which it is void for vagueness. A valid offer needs to be *animo contrahendi* and it must be unequivocal. (See *Bourbon-Leftley en Andere v WPK (Landbou) Bpk* 1999 (1) SA 902 (C) at 916 G-H.). It is usual that there must be consensus between the parties and this is usually determined by the existence of an expressed offer and acceptance. It is not sufficient that the offer was a mere proposal made while the parties were feeling their way towards a more precise and comprehensive agreement. (See *Pitout v North Cape Lifestock Co-Op Ltd* 1977 (4) SA 842 (A) at 860B.). The Court finds that Mr Smith did not make a clear offer, as there were no details or terms as to the offer or acceptance of the positions at Chrysler or Mitsubishi. Accordingly, there was not a meeting of minds between Mr Smith and Mr Bezuidenhout (See *Schoeman v IT Management Advisory Services (Pty) Ltd* (2002) ILJ 1074 (LC) at para 15). As stated by Grogan, ‘True agreement also presupposes that at the time of contracting, the parties are fully aware of the nature of the duties to which they

have agreed, and of the obligations that they have assumed'.⁴ If an arbitrator commits a material error of law, the arbitration hearing may be reviewed. (See *Maneche and Others v Commission For Conciliation, Mediation & Arbitration and Others*.(2007) 28 ILJ 2594 (LC) at para 13)

- [28] The arbitrator's finding that Mr Bezuidenhout was not interested in the positions offered to him is unreasonable. Mr Bezuidenhout cannot be faulted for not accepting a transfer to a position which was already filled. Mr Smith should have given him an offer in writing, giving him details of what he would be doing, what his position would be, his salary, and the conditions of his employment. (See *Nathan v The Reclamation Group (Pty) Ltd* (2002) ILJ 588 (CCMA) at 601 C-D).
- [29] There is no evidence upon which the arbitrator could have come to the conclusion that the employee was not interested in any other position than the dealer principal position. The transcript depicts that Mr Bezuidenhout would have considered any of the other three positions as he was suitably qualified. This was never disputed during the cross-examination of Mr Bezuidenhout. During the hearing, the arbitrator asked the applicant's representative whether the applicant's case was that he qualified for all the four positions and the answer was "yes".
- [30] The arbitrator misunderstood Mr Bezuidenhout's reason for having accepted the retrenchment package. The arbitrator ignored the uncontested evidence of Mr Bezuidenhout and Mr Samuel, that Bles de Wet, the dealer principal in George, did not want Mr Bezuidenhout at the George branch. Had Mr Bezuidenhout rejected the retrenchment package, he would have been transferred to the George branch working under someone who had expressly stated on numerous occasions, he did not want him there. The arbitrator further misunderstood the applicant's case by finding that the applicants' case was based on the fact that certain positions had become available, for which Mr Bezuidenhout qualified, but the employer failed to consider him. This is incorrect. The applicants' case was

⁴ *Employment Rights* (2010, Juta) at page 46.

that certain positions had become available, for which Mr Bezuidenhout qualified, but the employer failed to offer any of these positions to him for his acceptance. If an arbitrator has misconceived the nature of the dispute, then as stated in *Mashiane v Dolie No and Others* [2010] 4 BLLR 422 (LC) the award stands to be reviewed and set aside.

- [31] Counsel for the employer argued that the facts before this Court are similar to those of *Kock v Enviroserve Waste Management*,⁵ where it was held that failure to offer the applicant a position which he had rejected on three former occasions was not unfair. The court respectively disagrees. The facts of that case are distinguishable to the present case, as Mr Bezuidenhout never rejected any offer.
- [32] It is clear that the arbitrator misunderstood the contractual obligation on the employer. It is trite law that failure to re-employ when there is a formal binding written agreement, amounts to an unfair labour practice, in terms of section 186 (2) (C) of the LRA. (See *NAAWU v Borg-Warner SA (Pty) Ltd* (1994) 15 ILJ 509 (A) at 519). The *onus* rests on the applicants to show that there is an obligation on the employer to re-employ him. It is common cause there was a written agreement in which the employer under-took to re-employ Mr Bezuidenhout should a position become available for which he qualified. The action of the employer to consider other people to fill the three positions of sales manager, instead of Mr Bezuidenhout, amounted to a breach of the written agreement and was unfair. (See *NAAWU v Borg-Warner SA (Pty) Ltd*).
- [33] The employer in the answering affidavit raised the fact that Mr Bezuidenhout had waived his right to be offered further positions. There is no conduct on the part of Mr Bezudienhout in the form of outward manifestations or un-communicated mental reservations that can be objectively interpreted as an intention to waive his right to further positions. (See *Road Accident Fund v Mothupi* 2000 (4) SA (SCA) at 40.)

⁵ [2001] 7 BLLR 765 (LC).

[34] In terms of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,⁶ in deciding whether an award is reviewable, the only question that needs to be asked is whether the decision reached by the arbitrator is one that a reasonable decision-maker could not have reached. The court finds the arbitrator's finding is not one which a reasonable decision-maker could have reached and is therefore reviewable.

[35] The review application stands to be granted.

[36] From the arbitration hearing, it appears that there is still a good working relationship between the employer and Mr Bezuidenhout, and accordingly, there appears no reason why Mr Bezuidenhout should not be placed in a position as sales manager. The fact that all such positions may currently be filled is something the employer should have kept in mind all this time. As stated in *SA Commercial Catering & Allied Workers Union and Others v Mahawane Country Club*,⁷ 'The respondent can only have itself to blame if the second and further appellants are reinstated and it has to decide what to do with its present employees'.

[37] Both parties sought costs against each other. There is no reason why costs should not follow the result.

[38] The court will not refer the matter back to the CCMA commissioner, but will substitute the award with the following:

1. The arbitrator's award, dated 7 May 2011, issued under the auspices of MIBCO under case number MICT 9639 is reviewed and set aside
2. The said award is substituted with the following award:

2.1 It is declared that the employer committed an unfair labour practice

6 (2007) 28 ILJ 2405 (CC); 12 BLLR 1097 (CC).

7 (2002) 23 ILJ 902 (LAC).

in terms of section 186(2) (C) of the Labour Relations Act;

2.2 The employer is ordered to re-employ Mr Bezuidenhout in the position of general sales manager, alternatively the position of sales manager-Mercedes, further alternatively, the position of pre-owned sales manager, within 30 days of the date on which this order is served on it

3. The employer is ordered to pay the costs of the review application as well as the costs of the applicants' condonation application.

Dosio AJ

Acting Judge of the Labour Court

APPEARANCES

FOR THE APPLICANTS:

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FOR THE FIRST RESPONDENT:

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