



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 502/11

In the matter between:

PATRICK KGALEGI

Applicant

~~and~~ And

BLINKWATER MILLS (PTY) LTD

Respondent

Heard: 20 October 2014

Delivered: 26 March 2015

JUDGMENT

Nkutha-Nkontwana AJ

Introduction

[1] In this matter, the Applicant is challenging his dismissal that occurred on 10 March 2011 on the basis that it was substantively and procedurally unfair.

The issues for determination are accordingly as follows:

- 1.1 Whether there was a reason to retrench the Applicant.
- 1.2 Whether the respondent did comply with the provisions of section 189 of the Labour Relations Act of 1995, as amended ("LRA").

Factual background

- [2] The Applicant was employed by Respondent on 1 June 2009 in a position of a Human Resources ("HR") Clerk. His services were terminated on 10 March 2011 due to the Respondent's operational requirements and at that time he was earning R7 560.00 per month.
- [3] On 17 January 2011, the Respondent handed the Applicant with its notice of intention to retrench him due to the centralisation of administration functions including HR.
- [4] The first consultation took place on 21 January 2011. The parties agreed that, since the Applicant had already applied for a position of a Depot Auditor, the consultation be postponed in order to assess his suitability for that position.
- [5] As part of his assessment for the Depot Auditor position, the Applicant wrote a written test prepared by Mr Raymond Le Roux (Le Roux"), the Respondent's Financial Manager, who was its only witness in these proceedings. That was followed by a field experiment for a week (24 to 28 January 2011) where the Applicant job shadowed other Depot Auditors.
- [6] The second consultation was held on 3 March 2011. The Respondent communicated to the Applicant that he was found unsuitable for the position of Depot Auditor. At that point, the Applicant availed himself for a position of Area Controller which had been identified and offered as an alternative to dismissal.
- [7] The position of Area Controller became vacant due to the dismissal of Mr Solomon Mogoani ("Mogoani"), the then incumbent, for illness on 24 December 2010. On 3 March 2011, the consultation meeting was adjourned in order to allow the Respondent time to receive further medical reports regarding Mogoani's medical condition.
- [8] On 10 March 2011, the Applicant was served with a notice of termination of his services due to operational requirements. The Applicant seeks retrospect reinstatement.

Respondent's case

- [9] Mr Le Roux, the only witness called by the Respondent, testified that he is based at the Respondent's head office in Middleburg. Whilst, the Applicant was based in the Stoffberg dealing with HR functions such as filing of provident fund applications, employees' personal files and leave applications.
- [10] Respondent's head office used to be in Stoffberg but relocated to Middleburg 12 years ago. It became cumbersome to operate from a small town due to communication problems. There was a delay in receiving information from the Applicant for purposes of attending to queries from families of the deceased employees or for credit applications.
- [11] As a result, the Respondents senior managers decided to move the HR functions to head office. The Applicant was the only person affected since other employees in Stoffberg office were site specific. His position fell under administration and the functions thereto could be performed from head office.
- [12] During the consultation meeting of 21 January 2011, the following reasons were given as the basis for the decision to centralise the HR function that was performed by the Applicant:
- 12.1 The issue with communication between head office and Stoffberg causing delay in, *inter alia*, decision-making and control;
 - 12.2 Possible future restructuring; and
 - 12.3 That the work load and the position does not justify it being a full time occupied position.
- [13] The possibility of alternative positions was discussed during that consultation meeting and the Respondent identified three vacant positions (i.e. Cash Book Clerk, 2, Depot Auditors, and Area Controller).
- [14] These alternative positions were discussed extensively during the consultation meeting of 3 March 2011. The Respondent maintained that both Depot Auditor and Cash Book Clerk positions needed an accounting

background which the Applicant lacked and hence he was found unsuitable. Regarding the Area Controller position, Mogoani wanted to keep his position despite his medical report. However, it was also discovered that the incapacity forms were never filed with the provident fund and it was the responsibility of the Applicant to do so. Mogoani was finally declared incapacitated in 2013.

[15] There were no other alternative positions at that time and the Applicant's position did not warrant being full time. He had realised that the Applicant was spending most of his time at work visiting pornographic sites and chatting with colleagues. The Department is currently well run than ever before without the Applicant.

[16] Reinstatement would not be feasible since there are no suitable, vacant positions for the Applicant.

[17] Under cross-examination, Le Roux testified as follows:

17.1 He had no proof to support the Applicant's evidence that he reported the faulty Telekom line and to no avail.

17.2 Restructuring meant moving the Applicant's functions to head office for easy management and control.

17.3 Mogoani's services were terminated on 24 November 2010 due to illness as reflected in his certificate of service. Had the provident fund found him fit for service, the Respondent would have reinstated him.

17.4 He could not produce the Applicant's job description and had no evidence to prove that his tasks had changed to an extent that the position became insignificant.

17.5 The Area Controller position was never filled because the provident fund decision came in 2013.

17.6 The Applicant was not considered for a vacant position of a Controller Packing Position which was advertised on 10 March 2011 because he had no technical background.

[18] The Applicant's service was accordingly terminated on 10 March 2011.

The Applicants case

[19] The Applicant testified that he was handed with a notice of the Respondent's intention to retrench him on 17 January 2011. On 19 January 2011, he applied for a vacant position of Depot Auditor. The first consultation meeting held on 21 January 2011 focused on that position and Le Roux subjected him to a test in order to assess his abilities. Subsequently, he was allowed to job shadow the other Depot Auditors for a week.

[20] He was of the view that he managed to demonstrate his capabilities even though he could have benefited from a longer period of training. On 3 March 2011, Le Roux told him that he was not suitable for that position since he had no financial background.

[21] To his surprise, the position of Area Controller, which he had categorically availed himself for, was removed as an alternative. Le Roux told him that Mogoani had asked for his job back and hence they had to wait for the medical report in order to decide whether to re-employ him.

[22] The consultation meeting of 3 March 2011 was adjourned with an understanding that it would be reconvened in order to finalise the process. However, on 10 March 2011, he was served with a termination letter.

[23] On the same day, 10 March 2011, the Respondent advertised more vacant positions which he qualified for. He applied for a Controller Packing position which required a standard 10, a drivers' licence and supervisory skills. He was expecting the Respondent to prefer him for appointment in honouring the assurance to re-employ him made in his letter of termination.

[24] It was only in July 2011, after persistent inquiring about the said recruitment, that he learnt that he did not succeed. The Reason given by the Respondent was that it had upgraded its machines and as such there was no training capacity internally. However, the person who was employed in his stead was

trained by another colleague. The Respondent had the machines for the first time and its decision not to employ him was inconsistent and unfair.

[25] Under cross-examination, he testified as follows:

25.1 He wanted to be reinstated because the Area Controller position is still vacant and suitable. Even though he is currently unemployed, he did some private work for the SAPS from July 2012 to July 2013.

25.2 His position was not redundant per se, Le Roux conceded that his duties were given to another employee at head office.

25.3 The communication of documents was done through a fax line.

25.4 Even though he was not qualified for the Depot Auditor position, he had an expectation that he would be given an opportunity. He made himself available for the Area Controller position and was willing to relocate to Burgersfort.

25.5 The delay of more than three year in prosecuting this matter was caused by the Respondent's attorneys by refusing to sign the pre-trial minutes. They were difficult and tried to bully him since he is unrepresented. The reason why the matter did not proceed on 22 August 2013 is because both parties did not receive the notice of set down. As a result, the matter was removed from the roll by agreement between the parties.

Submission

[26] The parties filed detailed written submissions, and as such, I do not propose to set them out in this judgment, save to refer to those that are pertinent in contextualising this judgment.

Applicable legal principles

[27] Whilst section 189 of the LRA recognises the right of the employer to dismiss employees for operational reasons, the employer anticipating retrenchment is

enjoined to consult with the union or employees likely to be affected by the retrenchment.¹

[28] The employer has a responsibility not to dismiss an employee for operational requirements if that can be avoided. Hence the employer and the employees or their representatives must attempt to reach consensus on appropriate measures to avoid the anticipated dismissals.² The employer is required 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.³

[29] Accordingly, since operational requirements constitute the so-called "no-fault terminations, there is an expectation that dismissal would be a measure of last resort. In *Oosthuizen v Telkom SA Ltd*,⁴ the Labour Appeal Court stated that:

'This obligation also includes that, where the employee may need some training in order to be able to perform the duties attached to an alternative position, the employer should afford the employee the opportunity to get such training. Naturally, this has to be within reason because, obviously, the employer should also not be burdened with an exercise that may have undue cost implications. I note that paragraph 21 of ILO Recommendation 166, the Termination of Employment Recommendation, 1982 provides as follows:

"The measures which should be considered with a view to averting or minimising termination of employment for reasons of an economic, technological, structural or similar nature might include, inter alia, . . . internal transfers, training and retraining, . . . ' (my underlining).

[30] Section 189(2) of the LRA provides that:

'The employer and the other consulting parties must, in the consultation envisaged by subsections (1) and (3), engage in a meaningful joint consensus-seeking process and attempt to reach consensus on-

¹ Section 189(1) of the LRA.

² Section 189(2)(a)(i) of the LRA.

³ Section 189(3)(b).

⁴ [2007] JOL 20249 (LAC) at para 5.

- (a) *appropriate measures-*
 - (i) *to avoid the dismissals;*
 - (ii) *to minimise the number of dismissals;*
 - (iii) *to change the timing of the dismissal; 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.'*

[31] It is, therefore, imperative that, in the event that the consulting parties are unable to find a solution to avoiding the retrenchment, they continue to consult on the timing of the retrenchment, ways to minimise its adverse effect, selection criteria and severance pay.⁵

Analysis

[32] The Applicant is challenging the substantive fairness of his dismissal on the ground that the Respondent failed to prove that it was for a reason related to its operational requirements.

[33] The Respondent gave three different explanations to rationalise the retrenchment. Firstly, in its notice to commence consultation, it stated that it was restructuring the department. Secondly, in the Respondent's written response to the Applicant queries, it stated that it wanted to have a better control of the department and save money since the Applicant's workload did not justify a full time position. Thirdly, during consultation meeting of 21 January 2014, it stated that it was due to communication problem between Stoffberg and head office, possible future restructuring and workload did not justify full time position.

[34] It is my view that nothing turns on the Respondent's centralisation of administration department and the occasioned move of HR functions to head office since, ordinarily, the Applicant could have relocated offices as well. It

⁵ *Adams v DCD-Dorbyl Marine (Pty) Ltd* (2011) 32 ILJ 2472 (LC) at para 10.

would seem that the reason for not affording the Applicant an opportunity to relocate with his position is the Respondent's decision that he was not gainfully employed.

- [35] Le Roux testified that he concluded that Applicant's workload did not justify a full time position after he had noticed that he spent considerable time browsing pornographic sites and was always chatting with colleagues instead of working. However, he conceded under cross-examination that the Applicant had no job description and as such there was no evidence to prove that the job content had been changed and the extent of those changes.
- [36] In contrast, it is common cause that, in addition to HR file management tasks, the Applicant assisted the site with recruitment, disputes resolution, disciplinary hearings and representation at the CCMA. However, The Respondent was adamant the all these tasks could be executed from head office by another member of the department in addition to their normal day-to-day activities.
- [37] The above Respondent's attitude gives credence to the Applicant's evidence that his job was never redundant but was given to someone else unduly. To the extent that the Respondent sought to justify terminating the Applicant's employment by referring to the allegations of misconduct, it is my view that it ought to have conducted a disciplinary hearing instead of retrenchment. Therefore, its conduct in this regard offended the tenet that a retrenchment is a no fault termination.
- [38] The Respondent submitted, with references to Labour Appeal Court judgement in *Sacwu v Afrox Ltd*,⁶ that fairness of retrenchment is not dependent of it being used as a last resort. This submission is correct, however the Court went further to state that:

'By making fairness of the dismissal a matter of proof (sections 188(1)(a) and 192(2)), the LRA has made the assessment of fairness dependent on the factors proved and canvassed in evidence in court. This imposes a discipline upon the parties to the dispute and the person hearing the case. If an

⁶ [1999] 10 BLLR 1005 (LAC) at para 43.

employer wishes to show that it considered appropriate options other than dismissal it must present evidence to that effect and explain why it chose a particular course and not another. If an employee wishes to challenge that evidence it must do so by proper cross-examination on the relevant issues and, if considered necessary, by leading rebutting evidence. If this shows up the untenability of the employer's position, it will have a material effect in the final assessment of fairness. The presiding officer's assessment of the fairness or otherwise of the dismissal will also be dependent on the evidence presented before him or her.'

[39] In *Decision Surveys International (Pty) Ltd v Dlamini and Others*,⁷ the Court stated that:

'The ultimate decision to retrench must be fair. In this context, fairness means that the ultimate decision to retrench must "properly and genuinely" be justified by operational requirements. The ultimate decision must be "genuine and not merely a sham" (SACTWU & others v Discreto (supra) at paragraph 8). The court's function, therefore, is not merely to determine whether the requirements for a proper consultation process have been followed and whether the decision to retrench was commercially justifiable. There may be other options open to the employer other than retrenchment such as short time, casual employment, or demotion. If the employer resorts to retrenchment when alternatives to retrenchment are available, it cannot be said that the ultimate decision to retrench is necessarily fair. The court will, therefore, examine the reasons advanced for retrenchment in order to determine whether the ultimate decision to retrench is genuine and not a sham. However, this is not to say courts are to second guess the commercial or business efficacy of the employer's decision. Nor is the enquiry whether the best decision was taken . . . The enquiry is whether the retrenchment is properly and genuinely justified by operational requirements in the sense that it was a reasonable option in the circumstances.'

[40] There is no evidence that the Respondent did consider, whether on its own prior to or during the consultation meetings, a possibility of affording the Applicant an opportunity to work part-time or in any other manner that would commensurate with the job content as means of avoiding retrenchment.

⁷ [1999] 5 BLLR 413 (LAC) at para 27.

- [41] Also, there were three vacancies at the commencement of the consultation with the Applicant and only two were seriously considered during consultation.
- [42] Even though the Applicant conceded under cross-examination that the Depot Auditor position needed financial qualification, he was adamant that he had demonstrated potential and with necessary training he could have acquired the necessary technical knowledge. It is my view that, given the criticalness of financial positions in any business, it is imperative that employees in that department should at least have some form of formal qualification in finance. Therefore, the Respondent correctly submitted that any attempt to train the Applicant in that regard would have been burdensome.
- [43] The only suitable position that had to be considered was that of the Area Controller. Le Roux conceded under cross-examination that Mogaoni was dismissed on 24 November 2010 and due to illness, as reflected in his certificate of service he had never returned to work since then. There is no evidence from Mogaoni's doctor confirming a subsequent change in his medical condition so as to qualify him for reinstatement. Therefore, it is highly improbable that he had ever requested to be reinstated.
- [44] Le Roux testified that the position was never filled because the provident fund finally approved Mogaobi's medical boarding in 2013. Therefore, it is disingenuous of the Respondent to submit in its written submissions that this position was never filled due to restructuring.
- [45] There is no evidence to establish precisely why the Respondent bailed out of consultation without consensus. Furthermore, there is no evidence to establish a cogent reason for not appointing the Applicant to the Controller Packing position which was vacant at the time of his termination.
- [46] It is my view, based on above, that the Respondent frustrated every available opportunity it had had to avoid the Applicant's retrenchment. Therefore, the consequential retrenchment was irrational and unjustifiable.
- [47] The Applicant is also challenging the fairness of the procedure adopted by the

Respondent leading to his retrenchment. The principles on procedural fairness of the retrenchment are contextualised in *Kotze v Rebel Discount Liquor Group (Pty) Ltd*⁸ are pertinent.

- [48] Firstly, the court stated that the need to consult before a final decision is not only practical but constitutional in that “consultation provides employees or their union with a fair opportunity to make meaningful and effective proposals relating to the need for retrenchment or if such need is accepted, the extent and implementation of the retrenchment process...It satisfies principle because it gives effect to the desire of employees, who may be affected, to be heard and helps to avoid or at least reduce industrial conflict...”
- [49] Secondly, the court stated further that “implicit in the requirement of a fair opportunity to make a meaningful proposal is the duty to give employees reasonable notice of the proposed retrenchment. Such notice must allow them time and space to absorb the shock brought about by the daunting prospect of losing their jobs. As a general proposition, no employee can reasonably be expected to constructively and effectively engage the employer on such a serious matter from the very minute the bad news is broken to him or her. He or she must be afforded the opportunity to come to terms with the situation, to reflect on the matter, to seek advice and prepare for consultation and only then can a fair and genuine consultation begin...”
- [50] Lastly, the court stated that “the final decision to retrench must be informed by what transpired during consultation. That is why consultation must precede the final decision. The requirement of consultation is essentially a formal or procedural one, but it also has a substantive purpose. That purpose is to ensure that such a decision is properly and genuinely justifiable by the operational requirements or by a commercial or business rationale.”
- [51] It is common cause that the second consultation held on 3 March 2011 was adjourned without consensus on issues discussed and finality on the process.

⁸ [2000] 2 BLLR 138 (LAC) at para 18.

There is no evidence that there was compliance by the Respondent with section 189(2) of the LRA subsequently.

[52] Conversely, on 10 March 2011 the Respondent terminated the Applicant's services 'due to the fact that no viable available alternatives to retrenchment meeting could be found.' I have already indicated above that there were other vacancies available but were never offered to the Applicant. However, even if no alternative vacancies were available, the Respondent ought to have continued to consult on timing of the retrenchment, ways to minimise its adverse effect, selection criteria and severance pay.⁹

[53] Clearly, the Respondent did not attempt to engage in a meaningful joint consensus seeking process as it bailed out of the consultation process. I note that the Respondent was assisted by Ms Visagie, a labour consultant, during the consultation meetings. Therefore, it ought to have been better advised about the legal requirements. In light of the fact that the consultation was patently inadequate, the consequent dismissal of the Applicant was procedurally unfair.¹⁰

Conclusion

[54] In the premises, the Applicant's dismissal was both substantively and procedurally unfair.

Relief

[55] The Applicant testified that he would like to be reinstated. In *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*,¹¹ the Constitutional Court, in dealing with reinstatement, stated that:

⁹ *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC) also reported at [1998] 12 BLLR 1209 (LAC).

¹⁰ *Broll Property Group (Pty) Ltd v Du Pont* (2006) 27 ILJ 260 (LAC).

¹¹ [2008] 12 BLLR 1129 (CC) at para 36.

'Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal. As the language of section 193(1)(a) indicates, the extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal. The court or arbitrator may thus decide the date from which the reinstatement will run, but may not order reinstatement from a date earlier than the date of dismissal. The ordinary meaning of the word "reinstatement" means that the reinstatement will not run a date from after the arbitration award. Ordinarily then, if a Commissioner of the CCMA order the reinstatement of an employee that reinstatement will operate from the date of the award of the CCMA, unless the Commissioner decides to render the reinstatement retrospective. The fact that the dismissed employee has been without income during the period since his or her dismissal must, among other things, be taken into account in the exercise of the discretion, given that the employee's having been without income for that period was a direct result of the employer's conduct in dismissing him or her unfairly.'

[56] There is no evidence led by the Respondent to indicate that Applicant's reinstatement would not be reasonably practicable.¹² Conversely, the position of Area Controller is suitable and available. However, the Respondent submitted that the extent of reinstatement should be limited due to the delay in prosecuting this matter attributable to the Applicant. Indeed, there is a delay of more than three years but the Applicant attributed the delay to the Respondent's attorneys who sought to take advantage of him because he was unrepresented.

[57] It is my view that the Respondent's attorneys ought to have stepped in and assisted the Applicant to drive the process; firstly, as officers of the Court and, secondly, for expeditious finalisation of this matter in the interest of their client. Even though the Applicant is unrepresented, I noticed that he attended to the

¹² Section 193(a) and (b) of the LRA.

matter with diligence and unparalleled skill for a person who is not legally trained. I, accordingly, have no reason to penalise him for the delay.

Costs

[58] The issue of costs does not arise as the Applicant is unrepresented.

Order

[59] In the circumstances, I make the following order:

1. The Applicant's dismissal is both substantively and procedurally unfair;
2. The Respondent is ordered to reinstate the Applicant to his former post retrospectively to 10 March 2011, on the same terms and conditions of employment as previously held and without the loss of any remuneration or benefits;
3. The Respondent is ordered to offer to the Applicant the position of Area Controller as an alternative to retrenchment; and
4. There is no order as to costs.

Nkutha-Nkontwana AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT:

Self represented

FOR THE RESPONDENT:

Adv. R Grundlineh

Briefed by OJ Botha Attorneys

LABOUR COURT