

SOUTH AFRICA / JUDGMENT

Blom v Goldfields Logistics (Pty) Ltd (JS 858/16) [2021] ZALCJHB 62 (18 May 2021)

[2021] ZALCJHB 62

COURT

Labour Court Johannesburg

BEFORE

G N Moshwana

CASE / FILE NUMBER

JS 858/16

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The Labour Court of South Africa, JOHANNESBURG

Not Reportable

case no: JS 858/16

In the matter between:

CHENE BLOM

Applicant

and

GOLDFIELDS LOGISTICS (PTY) LTD

Respondent

Heard: 13 – 14 May 2021

Delivered: 18 May 2021

Summary: A referral in terms of section 191 of the Labour Relations Act, 1995. It remains the duty of an employer to avoid a *absque culpa* dismissal. Dismissal for operational requirements is a *absque culpa* dismissal and should be applied as a measure of last resort. Where an employer has vacant positions at the time of dismissal, it cannot be said that the dismissal is the measure of last resort. Non-compliance with the provisions of section 189 renders a dismissal for operational requirements procedurally unfair. Strict compliance is required and not substantial compliance. Held (1): The dismissal of the applicant is both procedurally and substantively unfair. Held (2): The respondent is ordered to compensate the applicant an amount equivalent to 12 months' remuneration. Held (2): The respondent to pay the applicant's costs.

Judgment

MOSHOANA, J

Introduction

[1] This is a referral in terms of section 191[1] of the Labour Relations Act[2] (LRA). The respondent, Goldfields Logistics (Pty) Ltd (Goldfields) dismissed the applicant following a restructuring process of a division which serviced one of its clients, Premier Foods (Pty) Ltd (Premier). The applicant, Ms Chene Blom (Blom) was employed by Supergroup Supply Chain (Supergroup) since 1 July 2001. Effective 1 August 2015, Blom was transferred to Goldfields within the

contemplation of section 197 of the LRA. On or about 29 January 2016, the applicant was dismissed for reasons related to Goldfields’

operational requirements. Aggrieved by her dismissal, Blom referred a dispute, alleging unfair dismissal, to this Court for adjudication

after conciliation had failed to resolve the dispute. The dispute is defended by Goldfields.

Background

facts and evidence

[2] Goldfields is a logistics and warehousing company. Effective 1 August 2015, Goldfields took over the Premier contract for certain areas including Longmeadow from Supergroup. Blom was employed by Supergroup and servicing the Longmeadow area. After the takeover of the contract, Blom was transferred to Goldfields as an employee. Barely four months after the transfer, owing to the pressures from Supergroup, Goldfields commenced a restructuring process in order to suit the contractual needs of Supergroup as its client. The restructuring saw the position of Blom as a contracts manager and that of another employee, Mr Cain Mkhonto (Mkhonto) being

rendered redundant.

[3] Owing to the redundancy, Goldfields commenced a consultation process. On 14 December 2015, a so-called preparatory meeting was held with Blom and Mkhonto. The said meeting was facilitated by one Mr Dirk Coetzee, Goldfields’ labour consultant. In this meeting Blom and Mkhonto were advised of their redundancy. On 15 December 2015, a purported section 189 (3) of the LRA notice was issued to the pair, Blom and Mkhonto. The notice was only received by the pair on 7 January 2016. Four consultation meetings were held (on 7, 13, 19 and 28 January 2016). After those meetings and on 29 January 2016, the pair was dismissed.

[4] Goldfields, tendered the evidence of two witnesses, namely, Mr Henoeh Kruger (Kruger) and Mr Dirk Coetzee (Coetzee). Kruger held a position of a General Manager for about eleven and half years. He testified about the restructuring process and the commercial rationality

of the dismissal. He attended two of the consultation meetings. In his testimony, Blom made it clear that she was not prepared to take a lower position with a lower salary. She was not prepared to move to other areas. All she insisted on was to be paid two weeks' salary for each completed year of service as severance pay. The employer was unable to meet this demand. A settlement was attempted on 14 January 2016 but same failed after Blom refused to sign a settlement agreement. Although the vacant

position of a Fleet Manager was available during the consultation period same was not offered to Blom. However, Goldfields continued

tirelessly to attempt to find alternatives to avoid the dismissal of Blom. Ultimately, after having failed to obtain alternatives, Blom was dismissed. One Mr Geel was elevated to the position of Fleet Manager after the dismissal of Blom. During the course of the consultation, he was busy with contract negotiations with Sasol and a possibility existed for a position of a contract manager and/or dispatch manager. In April of 2016, the possibility materialized.

[5] Coetzee is a labour consultant with over 30 years' experience. He facilitated the consultation meetings and drew up minutes of such consultations. The minutes are a summary of the occurrences but not a verbatim transcription. He to a large extent corroborated the testimony of Kruger. He drafted the purported section 189 (3) notice and in his ebullient view, the notice complied with the provisions of the section. He testified that outside the consultation process, Blom was offered a position of an Administrator at Bothaville. Blom, although she had indicated willingness to consider the position, ultimately failed to accept it. He accepted

that it was the obligation of Goldfields to find alternatives for Blom, hence the tireless efforts to find one. He was not aware that during the consultation process, the Fleet Manager position was available. Had Goldfields acceded to the two weeks' severance pay demand, which would have saddled Goldfields back with an amount of about R170 000.00, the dispute could have been fully settled and this action would have been obviated.

[6] Blom testified in her own case. She started employment with Supermove a division of Supergroup. Shortly after her transfer to Goldfields, one Mr Ruan Barnard was employed to take over her duties. Barely five months after the transfer she received shocking news in a meeting with Coetzee that her position had become redundant. She disputed the evidence of Coetzee that she was offered an Administrative position. She was never offered any position. She was not prepared to accept a significantly low salary or a position that required her to relocate. Had she been offered a vacant position of a Fleet Manager, which was vacant since the transfer as the incumbent resigned, she would have accepted the position. Her salary would have lowered by about six thousand rand and she was prepared to

accept the lowered salary as it is not significantly lower. She believes that her dismissal was predetermined and the consultation

process was a sham. She however admitted that after the transfer, her functions shrunk because certain functions that were applicable to Supergroup were transferred in terms of section 197 of the LRA. She did not wish to be reinstated.

The applicable legal principles and evaluation

[7] It remains the duty of an employer to demonstrate that its decision to retrench is commercially rational. It is not the duty of this Court to second-guess a business decision of an employer. For as long as the decision is clothed with commercial rationality, the Court must accept it as being fair. The mandated test is not that of correctness of the business decision but its fairness. In this matter, I am satisfied that the respondent needed to restructure its business in order to satisfy the needs of Premier. The evidence of Goldfields' witnesses remains unchallenged on this front. What came was just criticism and not objective evidence to gainsay that Premier required certain things which compelled Goldfields to act in a particular manner to save costs. There can be no doubt that the position of Blom became less meaningful after the transfer because of certain functions being hived off through a section 197 transfer. An automatically unfair dismissal within the contemplation of section 187 (1) (g) of the LRA was attempted but wisely jettisoned since it was not properly pleaded. The Labour Appeal Court (LAC) in the matter of BMD Knitting Mills (Pty) Ltd v SA Clothing and Textile Workers Union,[3] said:

'... Viewed accordingly, the test becomes less deferential and the court is entitled to examine the content of the reasons given by the employer, albeit that the enquiry is not directed to whether the reason offered is the one which would have been chosen by the court. Fairness, not correctness is the mandated test.'

Was the dismissal of Blom the only viable option?

[8] The uncontested evidence was that as at the time of the dismissal of Blom, there was a vacant and available position of a Fleet Manager. There existed a real possibility that had the timing of the dismissal been changed to April 2016, Blom would have not been dismissed.

[9] It must be mentioned upfront that the duty to avoid dismissal for operational requirements rested with Goldfields. To this proposition,

Coetzee conceded. Before even proposing dismissal, an employer is obliged to consider alternatives[4]. It has not been suggested that prior to proposing dismissal an attempt was made to place Blom in any of the available positions.

This Court cannot simply accept the ipse dixit of an employer that Blom would not have accepted a lower position. The evidence of Coetzee that Blom was offered an Administrative

position lacks probative value. It has not been corroborated by Kruger and/or the minutes drafted by him. It must be false and a recent fabrication. This tireless efforts to find alternatives was meaningless regard being had to the perspicuous failure to offer Blom a vacant and available position of a Fleet Manager. It is truly perplexing that Blom was offered a very lowly position of Administrator whilst a one level lower position was vacant and available.

[10] It is true that an employee whose position has been made redundant will ultimately be dismissed if no vacancy is found for him or her. In *SAA v Bogopa and Others*,^[5] Zondo JP (as he then was) had the following to say:

[60] The question, which arises, is what the obligation of an employer is in relation to the dismissal of employees for operational requirements when it does away with an old structure and adopts a new structure (for operational requirements). An employer has an obligation to try and avoid the dismissal of an employee for operational requirements. This obligation entails that an employer may not dismiss an employee for operational requirements when such employer has a vacant position, the duties of which the employee concerned can perform with or without at least minimal training... Where the employer has a vacancy and the employee can perform the duties attached to that vacancy, the employer would be acting unfairly in dismissing the employee without offering the employee such a position and the ensuing dismissal would be without a fair reason. Where however, the employer offers the employee such a vacant position and the employee, having accepted the offer, fails to perform the duties attached to that position satisfactorily, the employer can deal with the case as a case of poor performance.” [My own underlining and emphasis]

[11] Similar sentiments were echoed in the *Oosthuizen v Telkom SA*^[6] matter where Zondo JP (as he then was) again said:

“[19] The fact that the respondent did not place any evidence before the Court to explain why it did not give one of the positions to the appellant and gave positions to other employees means that the respondent has failed to justify the dismissal of the appellant. In other words, the respondent selected employees from the redeployment pool to remain in its employ by virtue of appointing them to certain positions and selected those to be retrenched by not appointing them to any vacant posts. The respondent was obliged to explain the basis of such selection criteria applied and should have complied with the Act. And that means that if such criteria have not been agreed, they should be fair and objective. In the end one is left in the dark as to why the appellant was in effect selected to be among those who did not get any of its available positions and had to be retrenched.”

[12] Similarly, in this matter the Court is left in the dark as to why Blom could not be placed in the available vacant post of a Fleet Manager. Kruger accepted that Blom would have functioned in the position without any need for her to be trained any further. Had Goldfields offered the Fleet Manager position, her dismissal could have been avoided.

[13] I therefore conclude that the dismissal of Blom was not the only viable option. Therefore, on this basis, the dismissal of Blom could have been avoided and therefore substantively unfair.

Is the dismissal procedurally unfair?

- [14] The obligation to consult arises when an employer contemplates to dismiss an employee for reasons based on its operational requirements. The provisions of section 189 must be complied with in order to ensure that a dismissal for operational requirements is procedurally fair. Strict compliance as opposed to substantial compliance is required. Ms Edwards, appearing for Goldfields conceded, correctly so, that the purported section 189 (3) notice was not compliant despite the ebullient evidence by Coetzee that it is compliant. In terms of subsection (3) (b) a notice must set out the alternatives the employer considered before proposing dismissal and the reasons for rejecting same. This content is key in order to prepare the other consulting party to meaningfully participate. The written notice does not deal with this key aspect at all. The notice fails to deal with the possibility of future re-employment.
- [15] Section 189 (2) obliges the consulting parties to attempt consensus on appropriate measures to change the timing of the dismissals. Surely if the possibility of a Sasol contract was properly communicated, parties may have attempted to change the date of January 2016 and considered April 2016 instead. Had this alternative to save jobs been properly disclosed, the pair may have made a case to change the timing of the dismissal. It is rather unsettling to note that the meeting of 14 December 2015 was more of an ambush to the pair. Coetzee who was present in the meeting testified that the pair would have been informed by Kruger, who was absent himself, about the meeting. Blom testified and was not challenged that she had no idea about the purpose of the meeting and she was shocked when the news was broken to her. Curiously, this pressure from Premier affected the pair only and only the pair was

singled out for consultation. It must follow that the pair was faced with a *fait accompli*. Accordingly, the dismissal of Blom is found to be procedurally unfair.

The issue of relief

- [16] Blom did not wish to be reinstated. Having found that her dismissal was both substantively and procedurally unfair, it will be just and equitable that Blom be afforded maximum compensation. In *Bogopa*, the LAC held that it will be a rare case indeed where a Court would find that an employee whose dismissal is without a fair reason not to award maximum compensation to such an employee.

The issue of costs

- [17] Both parties submitted that costs must follow the results. This Court is not averse to such a submission. There is no longer an employer and employee relationship, thus there is nothing that would prevent costs from following the results.[7] As an additional factor, during the testimony of Coetzee, it became clear that the dispute was capable of settlement. This Court afforded the parties an opportunity to discuss settlement in view of clear evidence that there was a vacant and available position that could have avoided the dismissal of Blom. On the available authority of *Bogopa*, which the Court reasonably assumed that

Goldfields and its legal team was aware of, Goldfields should have seriously considered making a firm proposal to terminate the litigation and avoid costs.

[18] In the results the following order is made:

Order

1. The dismissal of Blom is procedurally and substantively unfair
2. The respondent Goldfields Logistics (Pty) Ltd is ordered to pay an amount of R 352 764 00 (R29 397.00 x 12) to Ms Chene Blom as compensation.
3. The respondent to pay the costs of this matter.

G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Mr G Lusenga and H Ngcobo of B M Kolisi Incorporated, Johannesburg.

For the Respondent: Ms M Edwards

Instructed by:

CDH Inc, Sandton.

[1] Section 191 (5) (b) (ii) – “the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is-based on the employer’s operational requirements.”

[2] No 66 of 1995, as amended.

[3]

(2001) 22 ILJ 2264 (LAC) at para 19.

[4] Section 189 (3) (b) of the LRA.

[5]

[2007] 11 BLLR 1065 (LAC) at para 60.

[6] (2007) 28 ILJ 2531 (LAC).

[7] Association of Mineworkers and Construction Union and Others v Ngululu Bulk Carriers (Pty) Limited (In Liquidation) and Others 2020

(7) BCLR 779 (CC).

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Prepared on 28 October 2026 · Esheria