

SOUTH AFRICA / JUDGMENT

Coetzee v Ithala SOC Limited (D700/15)

[2024] ZALCD 8 (12 March 2024)

[2024] ZALCD 8**COURT**

Labour Court Durban

BEFORE

Whitcher

CASE / FILE NUMBER

D700/15

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Source record**IN****THE LABOUR COURT OF SOUTH AFRICA, DURBAN****Not****Reportable****Case****No: D 700/15****In****the matter between:**ANDRE
COETZEE
Applicant
And
ITHALA
SOC LIMITED
Respondent**Heard:**2-3 December 2021; 2
March 2023; 12 December 2023**Delivered:**

(Electronically): 12 March 2024.

JUDGMENT**WHITCHER J****Introduction**

- [1] This case concerns a claim by the applicant that he was unfairly dismissed for operational reasons on 31 March 2015. The applicant contends that he was dismissed in circumstances where the decision was a *fait accompli* taken in October 2014; the respondent failed to consider him for alternative positions as a means of avoiding dismissal; and the respondent failed to consult him or his union in contravention of its duties under section 189 of the Labour Relations Act, 1995 (the LRA).
- [2] The respondent, in a special plea, contended that the applicant was not dismissed on 31 March 2015, but took early retirement with effect from 31 March 2015 and is precluded in terms of section 189A(13) of the LRA from raising the issue of procedural unfairness in this trial. Alternatively, the dismissal of the applicant for operational reasons was fair in all respects.
- [3] The first issue that falls to be determined therefore is whether the applicant was dismissed.

The

facts

- [4] The respondent is a financial institution which operates under an exemption licence issued by the South African Reserve Bank (“SARB”). Whilst it is a wholly owned subsidiary of Ithala Development Corporation (“IDFC”), it has a separate Board and corporate identity.
- [5] The applicant commenced employment with the respondent on 1 December 1989 as an Accounts Receivable Controller after having completed six years of articles including aspects of internal auditing. He progressed to the position of a Financial Accountant in the Finance Department and in March 2009 he was appointed as an Operations Accountant in the Channels Department, Head Office.
- [6] During mid-2014, the respondent embarked upon a business rationalization process under Section 189A of the Labour Relations Act 66 of 1995 (“LRA”). Phase two of the process commenced in November 2014 and involved the staff employed at the respondent’s head-office.
- [7] The only consulting party invited to the process was SAMWU who was recognised as the bargaining agent for employees on grade C1 and below.
- [8] At the time, the applicant was employed at the head-office as a financial accountant in the Channels Division at a higher grade and was a member of SASBO, a registered trade union.

- [9] On 22 October 2014, the CFO (Mr Ireland) addressed the following email to the HR Manager (Mr Gwala) and one other manager (Ms Taylor):

“I have attached a spreadsheet showing the headcount rationalisation per department, including early retirement...We need to establish the consultation process, and emphasise to the department heads that none of these positions can be replaced...”

- [10] The applicant’s position was listed as one of those the heads of department were instructed to consider as redundant in the consultation process.

- [11] The applicant relied on this email to support his contention that he was dismissed in circumstances where the decision was a fait accompli in October 2014.

- [12] On 3 March 2015, the respondent notified the applicant that it had consulted with SAMWU on the rationale for rationalising the business,

the issues contemplated in section 189 read with section 189A of the LRA including “selection criteria and HR implications (post consultation)”.

- [13] The applicant was further advised that his position has been affected due to the rationalisation process and that the respondent would endeavour to secure him an alternative position where possible. If it failed to do so, March 2015 would serve as his one month notice period.

- [14] According to the respondent the process of finding alternative employment within the organization for those affected by the restructuring was agreed during the consultation process with SAMWU. Due to the number of affected employees, it was agreed that the respondent would make available alternative positions and that affected employees would be prioritised in respect of those positions. They were however required to register their interest by applying for them. It was further agreed with SAMWU that due to regulatory

requirements as well as the scrutiny by SARB, posts within the governance areas (compliance, risk and internal audit) were excluded

from this agreement and were not considered for alternative placement of affected staff. The normal recruitment process in respect of those positions remained unaffected by the retrenchment process. Affected staff had to apply for these positions and meet the minimum requirements to be considered.

- [15] During the period November 2014 and February 2015, several vacant positions within the finance and audit departments were advertised within the respondent and at IDFC.

[16] Aware of the fact that the respondent was engaged in a cost rationalisation process and in anticipation of the possibility that his position may become affected, the applicant applied for two posts he believed he qualified for, advertised in December 2014: the post of Senior Internal Auditor in the Internal Audit Division of the respondent and an ordinary auditor position (which was one grade lower than the position he occupied). He was unsuccessful in securing either one.

[17] After the meeting on 3 March 2015, the applicant addressed an email to Mr Gwala in which he questioned whether he had been considered for the positions he had applied for.

[18] Mr Gwala responded as follows:

“I do not intend to enter into a debate with you. I have explained in the presence of all staff who are affected that all these processes

run concurrently. The governance areas (Compliance, Risk and Internal Audit) were not factored nor considered for alternative placement of the affected staff. That’s the reason the recruitment process in these areas were not halted. The above was communicated and consulted on with the union as well...I have also mentioned that the reason these areas were not factored is the required level of competence that the regulators demand...”

[19] On 23 March 2015, the applicant was notified that he would be retrenched with effect from 31 March 2015 (“the retrenchment notice”).

[20] On 24 March 2015, the applicant met with Mr Gwala to canvass the option of early retirement. Mr Gwala directed him to the remuneration and benefits department which serviced both the respondent and IDFC for advice on this issue. The department was managed by Terry Taylor and Caroline De Kock.

[21] The applicant approached Ms de Kock. He told her about his impending retrenchment and enquired if he could also apply for early retirement to secure the post-retirement medical aid benefit offered by the respondent. She advised him that he could.

[22] Upon the advice of Ms De Kock, on 26 March 2015 the applicant submitted his application for early retirement with effect from 31 March 2015. His application was approved by the respondent and by Old Mutual and took effect on 31 March 2015.

[23] In addition to the early retirement benefits and post-retirement medical aid benefit, the applicant also received the severance benefits payable to the employees who were retrenched in March 2015 and which had been set out in the retrenchment notice he had received on 23 March 2015. This was ostensibly paid to him on instructions of Ms de Kock who claimed there existed in the respondent the concept of “early retirement with retrenchment.”

[24] Mr Gwala testified that he was aware that the applicant wanted to pursue the early retirement route. He was not aware of this “early

retirement with retrenchment” practice and left the details of facilitating the applicant’s exit to the remuneration and benefits department managed by Ms Taylor and Ms de Kock.

Analysis

[25] Ms De Kock claimed that persons who were earmarked for retrenchment were permitted to take early retirement if they qualified in terms of their fund rules, in addition to receiving their retrenchment benefits. She conceded that there was no policy to this effect and claimed that it was a practice. She was however unable to specify when and how the practice developed or identify anyone to whom it had applied, prior to the applicant and a Mr Ndlovu who was also earmarked for retrenchment in March 2015. She testified that she relied solely on the representations from her manager, Ms Taylor, that the practice was a viable and longstanding one.

[26] Ms de Kock confirmed that the concept of “early retirement with retrenchment” was “our own terminology.” She conceded that it did not actually exist in any other context and that it was not a concept recognised by the pension fund. She also confirmed that it was an option that ultimately ended up costing the respondent more than if it simply retrenched an employee.

[27] Ms Taylor’s evidence suffered from the same deficiencies. She testified that she had been informed of the practice by Ms De Kock. She too was unable to point to anyone other than the applicant and Mr Ndlovu who benefitted from the practice.

[28] It is beneficial here to record certain email correspondence between Mr Gwala, Ms De Kock and Ms Taylor on 26 March 2015. It illustrates the above points.

[29] On the day, Mr Gwala wrote to one Buhle:

I have asked Caroline to prepare Ndlovu’s letter of retrenchment. She has indicated to me that he qualifies for both retirement and retrenchment...

In response, Ms Taylor wrote:

I have asked Caroline to respond pertaining this advice – or perhaps please clarify whom is giving this confusing advice to the employee?...

In response, Ms De Kock wrote:

...Ithala have always allowed person being retrenched to qualify for the benefits as per the rules, i.e. retrenchment but withdrawing from the fund as early retirement.

[30] The evidence illustrates that Ms de Kock appeared to be the only source of this so-called practice and that the other employees simply followed her lead on this issue.

[31] In any event, the claim that the applicant was dismissed (retrenched) on the basis of Ms de Kock's concept of "early retirement with retrenchment" offends against the meaning of dismissal as defined in section 186 of the LRA read with section 190 of the LRA and simple contract law.

[32] The legal situation is simply this. On 23 March 2015, the respondent took a decision to dismiss the applicant on 31 March 2015. However, before the dismissal could come into operation, the applicant offered on 27 March 2015 to take early retirement effective from 31 March 2015 (by virtue of his application for early retirement) and the respondent accepted the offer on 27 March 2015 (it signed off on the application on 27 March 2015).

[33] Put differently, before the dismissal could take effect, the parties agreed on 27 March 2015 that the applicant would take early

retirement. The expiry of the retrenchment notice period was thus superseded by an agreement that the applicant would take early

retirement effective from 31 March 2015.

[34] Dismissal means that an employer has terminated employment. While early retirement is bilateral act that requires the assent of the employer, it involves a voluntary act on the part of the employee to leave the service of the employer, as confirmed by the Labour Appeal Court. [1]

[35] In the case of NUPSAW obo Mtshali v Mpaphule N.O and others[2], the court held that a subsequent agreement to apply for early retirement (with its concomitant benefits) superseded the employer's

decision to dismiss the employee. In those circumstances, no dismissal was established and the bargaining council did not have jurisdiction to determine the matter. In casu, the applicant's application for early retirement preceded the proposed dismissal date of 31 March 2015.

[36] It is not disputed that the applicant could only take early retirement if he was still employed by the respondent. Accordingly, as at the date of retirement, the contract of employment remained extant. Axiomatically, the respondent could not have dismissed the applicant after his retirement took effect. There was accordingly no dismissal.

[37] In Sewsunker v Durban University of Technology[3], the court draws a distinction between the right retirement benefits which arise from the pension fund rules and a contractual right to a post-retirement medical aid benefit. The court held that the right to post-retirement medical aid is founded in the continuation of the employment contract with the employer. An employment contract endures until such time there is no longer a liability to provide ongoing contractual benefits.

[38] In casu, the post-retirement medical aid benefit the applicant receives is not available to a dismissed employee, irrespective of whether he/she qualifies for early retirement. The applicant remains on the payroll system, has an employee number and receives payment of a monthly medical aid subsidy which will endure for the rest of his and his spouse's natural life. The contract of employment accordingly remains extant, albeit that the applicant is not required to render reciprocal services.

[39] For all these reasons, I find that the applicant failed to discharge the onus of proving that he was dismissed for operational reasons and his claim falls to be dismissed.

Order

[40] The applicant's claim (referral under D700/15) is dismissed.

Benita Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

Macgregor Erasmus Attorneys Inc.

For the Respondent:

L.R Naidoo, SC

Instructed by Maynard Menon Govender Singh Inc

[1] See: SAMWU and another v SALGBC and others

[2014] ZALAC 64 at paras 29-32.

[2] [2015] ZALCD 49 at paras 11-14.

[3] [2013] ZAKZDHC 47 at paras 28-38.

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