

SOUTH AFRICA / JUDGMENT

Engelbrecht v Bachique 705 (Pty) Ltd t/a The New House of Busby (J 606/20) [2020] ZALCJHB 252 (3 August 2020) [2020] ZALCJHB 252

COURT

Labour Court Johannesburg

BEFORE

Nkutha-Nkontwana

CASE / FILE NUMBER

J 606/20

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

reportable

Case

no: J 606/20

In the matter between:

BRONWYN
ENGELBRECHT
Applicant
and
BACHIQUE 705 (Pty) LTD
t/a
THE NEW HOUSE OF
BUSBY
Respondent

Heard:

16 July 2020 (zoom proceedings)

Delivered:

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 3 August 2020.

Summary: Urgent application in terms of section 189A(13) of the LRA – applicant not interested in reinstatement – offer to reinstatement not bona fide – exceptional circumstances exists for the grant of compensation in terms of section 189A(13)(d) of the LRA.

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

- [1] This is an opposed urgent application brought in terms of section 189A(13) of the Labour Relations Act[1] (LRA) where the applicant is challenging the procedure that led to her retrenchment. Initially she sought reinstatement pending the respondent's compliance with fair procedure; alternatively, that the respondent be ordered to pay her compensation. The applicant also seeks an order as to costs.
- [2] The respondent concedes that the retrenchment of the applicant was not preceded by a fair procedure. On 8 July 2020, the respondent made a tender to reinstate the applicant with effect from 1 July 2020 and to withdraw the retrenchment process in respect of her. This offer is repeated in the respondent's answering affidavit. Obviously, the respondent is not opposing the application on the merits but to an extent that the applicant seeks costs against it. The respondent argued that since the applicant rejected the tender of reinstatement, it seeks costs against her.

Background

- [3] The Applicant was employed by the respondent's predecessor, the House of Busby (Pty) Ltd (Busby), with effect from 1 January 2012 in the position of Shipping Manager in the Shipping Department, reporting to Mr Andrew de Bruyn (Mr De Bruyn). Busby specialised in products such as handbags, luggage and high-quality leather accessories.
- [4] During 2018 Busby was acquired by the respondent trading as the New House of Busby (NHOB). Its business focusses on the development of international apparel and footwear brands, luggage and leather goods, branded and optical eyewear and private label development. NHOB represents luxury brands such as Guess, ALDO, Call it Spring, Steve Madden, Karen Millen, Kipling and Delsey. It also owns the Travelite and Busby brands.
- [5] The applicant was promoted to the position of Group Supply Chain and Sourcing Manager with effect from 1 October 2019 with related benefits. As Group Supply Chain and Sourcing Manager, the applicant headed the entire supply chain and was responsible for the running of the Distribution Centre (DC) in Gosforth Business Park, Germiston, which included procurement, inbound movement (imports), outbound movement and distribution of stock.

She oversaw over 200 staff members, reporting to Mr David Hirsch (Mr Hirsch), the Chief Operating Officer (COO) of NHOB.

- [6] According to the applicant, there were rumours that surfaced around early November 2019 that the NHOB would be moving to George. Mr Hirsch denied the rumours when questioned.
- [7] During December 2019, media reports revealed that NHOB and Mr Tekkie Town had concluded a business partnership. As part of the partnership, some of the executives and senior managers of Mr Tekkie were appointed to senior positions within NHOB. Mr Mostert (former CEO of Tekkie Town) became CEO of NHOB, Mr Van Niekerk (former COO of Tekkie Town) became Head of Retail and Property of NHOB, Mr Brown became the General Manager (GM) of the Luggage Division of NHOB and Mr Gert Claassens (Mr Claassens), who also came from Tekkie Town was appointed (as Commercial Manager).
- [8] It is common cause that as early as December 2019, the newly appointed managers started implementing steps that would ultimately result in the closure of the Distribution Centre in Germiston and the establishment of a new Distribution Centre in George. On 19 December 2019, Mr Claassens sent an email to the Applicant, advising her that he would be transporting all warehouse sale stock to George in January 2020 and that all returns had to be directed to George going forward.
- [9] On 13 February 2020, Mr Claassens sent an email to the applicant, capturing earlier discussions to move all Diadora stock to George. This was followed by Mr Mostert's communication confirming that 'George will play an integral part of the business going forward. In the communication, he writes 'We can set up our IT architecture and infrastructure to cater for a George Distribution Centre going forward please.'
- [10] On 25 February 2020, without any prior communication or warning to the applicant, Mr Claassens brought personnel from Laser, a logistics company, to the Germiston Distribution Centre to obtain quotations to move the luggage stock to George.
- [11] On 26 February 2020, Mr Mostert called meetings with groups of 10 people at a time wherein he, for the first time, communicated the restructuring of the business and that each division would deal with its restructuring separately. The Distribution Centre would be located either in George or Cape Town and the Shared Services be centralised, comprising of HR, IT and Finance. However, the Supply Chain was never discussed and there were no further meetings or discussions in this regard where the Applicant was present.
- [12] On 11 March 2020, Mr Claassens sent an email instructing that the luggage division be moved to George. As the preparations to relocate the Distribution Centre were taking place, the staff was left in the dark as to how the business was going to be restructured going forward and what role George would play in the future. According to the applicant, the move of stock from Germiston to George had caused a lot of anxiety amongst the warehouse staff in Germiston.

- [13] On 19 March 2020, Mr Claassens sent an email to Mr Hirsch, in which the applicant was copied, regarding the George Warehouse planning; mentioning that the number of staff in the warehouse would be a maximum of 100 people and that Mr Leslie Harker (Mr Harker) and Mr Charl Green (Mr Green), both from Mr Tekkie Town, would manage the warehouse. This was a drastic reduction in the number of staff compared to the almost 300 that were employed at the Germiston Distribution Centre.
- [14] Despite there not having been any formal communication from the executives about the business moving to George, all indications pointed in that direction. The NHOB staff in Germiston have not been informed of the future plans.
- [15] On 20 March 2020, Ms Pamela Barletta (Ms Barletta), the Group Head of Culture, forwarded an email to Mr Hirsch and the applicant which confirmed that, notwithstanding the clear indications that the business was moving to George and the anxiety it had caused amongst staff, still the Senior Management did not want to confirm unequivocally that it was indeed the position. However, external parties like the security company contracted by NHOB and Head of the Guess brand, Ms Gail Hahn (Ms Hahn), had been informed about the move of the business to George.
- [16] On 23 March 2020, the applicant received an email from Ms Tracy Johnson (Ms Johnson) regarding rates from Aramex for courier services. Ms Johnson explained her role of looking after Supply Chain in George with Mr Tekkie.
- [17] It is common knowledge that the national lockdown as a result of the Covid-19 pandemic commenced on 26 March
2020. The Applicant continued to work from home during this period and returned to the office occasionally from 1 May 2020. On 7 April 2020, the applicant had a meeting with Mr Hirsch to discuss her DC budget. It was then that she was informed that the budget was fictitious as the Germiston Distribution Centre would cease to exist.
- [18] The applicant became aware on 8 April 2020 that the CEO, Mr Mostert, had issued letters in terms of section 189(3) of the LRA to employees in Shared Services. The applicant asserts that she assumed that she would not be affected since she had not received a section 189(3) letter.
- [19] Notwithstanding, on 27 April 2020, Mr Hirsch phoned the applicant about the outsourcing of the Shipping Department to Glen Gerber (Mr Gerber), the CEO of Santova Inbound Clearing & Forwarding, a logistics company, who had been used by NHOB for many years. During the telephonic conversation, Mr Hirsch informed the applicant that there was no space for her in the company and, if Mr Gerber would not take her, there would be no space for her. The applicant was advised to approach Mr Gerber and proposed that she take a reduction in salary to work for him. The applicant flatly refused. Mr Hirsch told the applicant that there was no need for someone to run the Supply Chain.

[20] On 15 May 2020, the applicant received a section 189(3) of the LRA notice from Mr Mostert, inviting her to a consultation on operational requirements. The respondent, however, failed to make good on its promise to consult with the applicant. It is instructive that the said letter confirmed that the respondent had already decided that the Germiston Distribution Centre was no longer sustainable; to terminate the lease agreement with the Landlord; and to consider outsourcing the shipping function to a third party.

[21] On 2 June 2020, the applicant received the letter terminating her services stating that:

‘RE: OUTCOME OF CONSULTATION

As you have been aware and as per our previous meeting during April and May 2020, we have been engaged in a formal consultation process with you. Both parties have been exploring all internal as well as any other alternatives to avoiding a dismissal to operational requirements.

We however regret to inform you that a final decision has been made and that your position as a Supply Chain Manager controller within the company has become redundant and will be affected.

If a vacancy for which you are qualified and have experience in should arise within the following six (6) months, we will notify you of said vacancy; however re-employment cannot be guaranteed.

The details of your severance pay are as follows:

1. Employee will receive an Ex Gracia Severance payment being R215 401.17 less statutory deductions.
2. Leave pay calculated to June 2020 being R33 648.67 less statutory deductions will be paid at the end of June 2020.
3. Notice pay of R115 555.55 to be paid at the end of June 2020, less statutory deductions.

The severance pay due will be subject to the taxation rules as dictated by the South African Revenue Service.

Please take note is section 41.1 of the Basic Conditions of Employment Act which states the following:

An employee who reasonably refuses to accept the employer's offer of reasonable alternate employment with the employer is not entitled to severance pay.

We thank you for contribution to the company and wish you all the best in your future endeavours.’

[22] Disgruntled by the turn of events, particularly the fact that her retrenchment was not preceded by a fair procedure, on 1 July 2020, the applicant launched this application. On 8 July 2020, The respondent, through a letter from its attorneys of record, made an open offer to the applicant addressed to her attorneys of record, with the following terms:

- ‘1. Our client will reinstate your client in their employ effective as at the 1 July 2020
2. Our client will withdraw the retrenchment process against your client and your client will resume her employment with our client, without having been subjected to a resumption of any future retrenchment process.
3. As a consequence of the above tender we are of the view that pursuant to the principles contained in section 162 of the LRA that a cost order pursuant to the filing of the application would be appropriate in the circumstances.
4. Should your client elect to persist with its application in view of the above tender, our client will file an opposing affidavit annexing a copy of this letter and oppose your client’s application with regard to the issue of costs only.
5. ...’

[23] It is common cause that the applicant rejected the respondents’ tender. She asserts that the tender of reinstatement without being subjected to a further retrenchment process stands in complete contradiction with the position expressed by the respondent earlier when it sought to justify her dismissal due to operational requirements. Furthermore, that the respondent failed to provide specifics of the tender in the light of the fact that her position had been declared redundant, the Distribution Centre in Germiston has been closed entirely, the stock had been moved to the new Distribution Centre in George and all the staff who worked at the

Distribution Centre in Germiston were retrenched.

[24] The applicant questions the lack of details pertaining to her continued employment. also, it would seem that the Supply Chain role in the Distribution Centre in George has been allocated to other people. Accordingly, the applicant asserts that she does not believe the tender was made bona fide but is convinced that the tender was merely made as a tactical ploy to frustrate the legal process.

Legal principles and application

[25] It is common cause that section 189A of the LRA is applicable as the retrenchment exercise that the respondent embarked upon involves a large number of employees, including the applicant.

[26] Section 189A(13) of the LRA provides that:

‘If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order –

- (a) compelling the employer to comply with a fair procedure;
- (b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;
- (c) directing the employer to reinstate an employee until it has complied with a fair procedure;
- (d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate.'

[27] In the SA Society of Bank Officials on behalf of Fourie v Nedbank Ltd,[2] this Court, as per Van Niekerk, J crisply outlined the purpose of section 189A as follows:

'[10] The purpose of s 189A has been referred to in a number of judgments. In short, the introduction of s 189A sought to enhance the effectiveness of consultation in larger scale retrenchments, amongst other things by the introduction of the option of facilitation at an early stage, an option that may be elected by the employer in the s 189(3) notice, or by affected employees or their representatives within 15 days of the date of the s 189(3) notice. The appointment of a facilitator suspends the employer's right to dismiss for a period of 60 days, calculated from the date on which the s 189(3) notice is issued. If a facilitator is not appointed, the employer's right to dismiss is similarly subject to the expiry of specified time periods, calculated from the date of the s 189(3) notice. If notice of termination is given, employees have the option to exercise the right to strike over the substantive fairness of their dismissals, or to refer a dispute about substantive fairness to arbitration or adjudication (but not both).

[11] Section 189A(13) provides a procedure for the resolution of disputes about procedural fairness by way of motion proceedings...

[12] Section 189A was introduced as part of the raft of legislative amendments effected during 2002. For present purposes, the significance of the section is the separation that it effects between substantive and procedural fairness in retrenchment disputes, and the right that it confers on an employee to approach this court to insist on a fair procedure either before or shortly after any termination of employment. The policy underlying s 189A was set out by Murphy AJ (as he then was) in National Union of Metalworkers of SA & others v SA Five Engineering & others (2004) 25 ILJ 2358 (LC) where he said at para 7 of the judgment:

'Disputes about procedure in cases falling within the ambit of s 189A cannot be referred to the Labour Court by statement of claim, but must be dealt with by means of motion proceedings as contemplated in s 189A(13), the exact scope of which I will return to presently. Suffice it now to say that the intention of s 189A(13), read with s 189A(18), is to exclude procedural issues from the determination of fairness where the employees have opted for adjudication rather than industrial action, providing instead for a mechanism to pre-empt procedural problems before the

substantive issues become ripe for adjudication or industrial action.’

[13] Section 189A(14) provides that the court may make any appropriate order referred to in s 158(1)(a). That section confers a broad range of powers on the court, including the right to grant urgent interim orders, interdicts and declaratory orders.

[14] The preamble to s 189A(13) makes clear that the court’s intervention is limited to instances of a refusal or failure by the consulting employer to comply with a fair procedure. What the subsection seeks to accomplish, in the face of a prohibition on the right to strike over any dispute that concerns the procedural fairness of a retrenchment and the limitation on the right to refer a dispute of that nature to this court for adjudication in terms of s 191, is to extend to this court a supervisory role over the consultation process, with powers to intervene if and when necessary, and to craft remedies designed to address any procedural shortcomings that are found to exist. The section is not an invitation to consulting parties to use this court to micro-manage a consultation process — intervention ought to be limited to a substantial failure or refusal to comply with the relevant statutory.’

[28] It was with this background that the Constitutional Court in *Steenkamp and Others v Edcon Limited*,^[3] in answering the question whether section 189A(13)(d) is a self-standing remedy, stated the following:

‘[59] The remedies provided for in section 189A(13)(a)-(d) must be considered in the broader context of section 189A of the LRA and keeping in mind the overall purpose of section 189A(13).

[60] The primary purpose of section 189A(13) is thus to allow for early corrective action to get the retrenchment process back on track. Paragraphs (a)-(d) establish a hierarchy of appropriate relief. Only where it is not appropriate to grant an order in terms of paragraphs (a)-(c) may an order for compensation be granted in terms of paragraph (d).

[61] Can it be said then that the compensation remedy provided for in paragraph (d) is self-standing? The answer is no. The remedy provided for in section 189A(13)(d) cannot, as contended by the applicants, be divorced from the remainder of this section and given self-standing meaning.

[62] Before this Court, counsel for the respondent conceded that a postponement by a Judge of the consideration of the paragraph (d) compensation remedy may create the basis for compensation being considered separately. I think not.

[63] Whereas a postponement of the consideration of compensation at a later stage may separate its determination procedurally, a Judge who postpones consideration of paragraph (d) compensation would at least have had the benefit of considering the other three remedies and determined their inappropriateness.

[64] On its own terms, paragraph (d) provides for an exceptional remedy which is granted only where the primary remedies provided for in paragraphs (a)-(c) are inappropriate. From the reading of the language in the text of paragraph (d), it is cogent that remedy (d) will only be considered where (a)-(c) are “not appropriate”. This therefore means that a Judge who reaches the decision to postpone the consideration of paragraph (d) would have considered remedies in paragraphs (a)-(c) first and would have found these remedies inappropriate. Thus the compensation remedy can never be a stand-alone remedy. This was made clear by this Court in *Steenkamp I*, where it stated:

“Subsection (13)(d) provides that a consulting party may apply to the Labour Court for an award of compensation 'if an order in terms of paragraphs (a) to (c) is not appropriate. It seems to me that the phrase 'if an order in terms of paragraphs (a) to (c) is not appropriate constitutes a condition precedent that must exist before the court may award compensation. The significance of this condition precedent is that its effect is that the Labour Court is required to regard the orders provided for in subsection (13)(a)-(c) as the preferred remedies in the sense that the Labour Court should only consider the remedy in subsection (13)(d) when it is not appropriate to make any of the orders in subsection (13)(a)-(c).”

[65] Second, considering the purpose and overall scheme of section 189A(13) and against the background of what is stated in section 189A(18) of the LRA, the wording of the legislation is to remove the option of claiming compensation for procedural unfairness long after retrenchment from the arsenal of remedies available to retrenched employees who are dissatisfied with the process followed during the consultation. Third, section 189A(13) does not contemplate a procedure claiming compensation at some future remote time...

[66] The main purpose of the section and the remedies it provides is thus to “get the retrenchment process back onto a track that is fair.” Even the remedy of compensation must be read in the context of the short-term remedies provided for in the same subsection and in light of the jurisdictional restriction provided for in section 189A(18). Compensation in terms of section 189A(13)(d) cannot be the primary relief.’ (Footnotes omitted)

[29] As stated above, this matter turns on the question of the appropriate remedy. The applicant rejected the tender of reinstatement on the basis that it is not bona fide as the respondent seems to withdraw the whole retrenchment process without any specificity on what would be the role of the applicant following the closure of the Germiston Distribution Centre. The applicant cannot be slated for her suspicion given the fact that the respondent has no intention of remedying the shortcomings in the procedure that led to the termination of the applicant’s employment in line with the primary remedies in terms of section 189A(13)(a)-(c) of the LRA.

- [30] The respondent's volte-face in as far as the applicant's retrenchment remains unexplained. It is, however, instructive that the Germiston Distribution Centre has been rendered defunct consequent to the relocation of its activities to George. If the respondent is genuine about the future employment of the applicant, it ought to have come out clean and explained whether the applicant would be offered a new position and the location of that position so as to enable her to decide on the practicality of the tender.
- [31] The only conclusion that could be drawn from the respondent's conduct is that it made the tender of reinstatement solely to circumvent these proceedings and dodge the costs order against it. There is clearly no intention to resolve the dispute between the parties, which is procedural unfairness. As correctly contended by the applicant, her reinstatement would create more disputes than resolve the issue of the procedural defects.
- [32] In my view, the circumstances of the matter present an exceptional scenario that justifies a remedy of compensation as contemplated in section 189A(13)(d) of the LRA.

Conclusion

- [33] It follows that the applicant is entitled to a compensatory relief. The LRA provides that the amount of compensation ordered must be 'just and equitable' in all the circumstances.[4]
- [34] It is settled that, where an employee unreasonably rejects an offer of re-instatement intended to cure procedural unfairness, compensation
- will be refused.[5] In the present instance, as alluded above, the applicant's rejection of the offer of reinstatement is not unreasonable. Thus she is entitled to compensation.
- [35] However, in determining what is just and equitable, the guidelines set out in the dictum in Minister of Justice and Constitutional Development and Another v Tshishonga[6] does not find application as it is limited to a section 194(3) of the LRA relief. In the present instance, since the impugn pertains only to procedural fairness, this Court has a discretion to award compensation after a proper consideration of all the relevant
- circumstances, including the extent of the deviation from procedural requirements.[7]
- [36] It is common cause that the respondent failed to consult despite the promise to do so. Notably, the respondent was mum about its decision to relocate the Distribution Centre to George despite having effected the processes that ultimately saw the relocation realised. I have also considered the fact that, if a section 189A of the LRA consultation was revived, with the assistance of the facilitator, it would have taken 60 days for the process to conclude; alternatively, for the respondent to issue a termination letter in terms of section 189A(7). Even without a facilitator, the respondent would have been obliged to engage for at least for a period of 30 days before issuing a termination letter. Thus, in my view, compensation equivalent to three months' salary (R115 555.55 x 3 = 346 666,65.) is just and equitable.

Costs

[37] On the issue of costs, both parties sought costs on a punitive scale. However, I am not persuaded that a losing party should be saddled with punitive costs. Still, I am satisfied that a cost order against the respondent would not offend the principles of fairness and equity. As alluded to above, the respondent's tender of reinstatement was correctly rejected by the applicant as it would not have resolved the controversy between the parties.

[38] In the circumstances, I make the following order.

Order

1. The respondent is ordered to pay the applicant compensation equivalent to three months' salary which is 346 666,65.
2. The respondent is ordered to pay the applicant's costs on party and party scale.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Advocate Riaan Venter

Instructed by:

For the Respondent:

Advocate CS Bosch

[1] Act 66 of 1995, as amended.

[2] (2020) 41 ILJ 500 (LC) at paras 11 – 13..

[3] 2019

(7) BCLR 826 (CC); (2019) 40 ILJ 1731 (CC); [2019] 11 BLLR 1189 (CC).

[4] Section 194(1) of the LRA.

[5] See: Dr DC Kemp t/a Centralmed v Rawlins [2009] 11 BLLR 1027 (LAC) which was confirmed by the SCA in Rawlins v Kemp t/a Centralmed [2011] 1 BLLR 9 (SCA). See also Kukard v GKD Delkor (Pty) Ltd [2015] 1 BLLR 63 (LAC) at pars 27–29.

[6] [2009] 9 BLLR 862 (LAC).

[7] Rawlins supra n 5 at para.

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