

SOUTH AFRICA / JUDGMENT

Engelbrecht v Fraser Alexander (Pty) Ltd (JS518/2014) [2016] ZALCJHB 47 (10 February 2016) [2016] ZALCJHB 47

COURT

Labour Court Johannesburg

BEFORE

AC Basson

CASE / FILE NUMBER

JS518/2014

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case No: JS 518/2014

In the matter between:

BAREND JOHANNES JAKOBUS ENGELBRECHT

Applicant

and

FRASER ALEXANDER (PTY) LTD

Respondent

Heard: 16 November 2015

Delivered: 10 February 2016

Summary: Alleged unfair retrenchment in terms of section 191(5)(b)(ii) of the Labour Relations Act 66 of 1995. Retrenchment is found to be fair.

AC BASSON, J

[1] The respondent retrenched the applicant on 8 May 2015. The applicant alleged that his retrenchment was substantively and procedurally

unfair in terms of section 191(5)(b)(ii) of the Labour Relations Act^[1] for the following reasons:

- (i) The respondent unilaterally decided to restructure its Water Treatment Division before it commenced with the consultation process.
 - (ii) The respondent unilaterally decided to declare the applicant's position redundant before it commenced with the consultation process.
 - (iii) A vacant position in the Tailing Division – namely, that of a Project Manager – existed. The applicant had applied for the position. He alleged that he was qualified to fill the position, alternatively that he required minimal training in order to fill the position. The respondent, however, decided to appoint an outsider to the position – a one Mr Joel Kgomo (“Kgomo”).
 - (iv) The respondent refused to bump the applicant into the position of Mr Da Silva (“Da Silva”) who was employed in the Water Treatment Division. The applicant alleged that he was duly qualified to fill the position and that he had the necessary experience to fill the position. Moreover he was more senior than Da Silva.
 - (v) The respondent refused to consider bumping across its other four divisions thus preventing the applicant from identifying suitable positions where it could bump the applicant to.
- [2] The applicant seeks maximum compensating and costs in respect of claim one. In respect of claim 2 – a claim of notice pay – the applicant accepted the tender to pay the notice pay plus interest. The applicant seeks costs in respect of claim 2.
- [3] At the outset it should be noted that the applicant conceded that there was a general need to retrench.
- [4] Although the respondent opposed the claim, it conceded that the applicant's retrenchment was procedurally unfair but only to the extent that a decision was taken to appoint Mr Kgomo to a possible alternative position before the applicant was interviewed for this position. At the commencement of the proceedings, the respondent tendered compensation in an amount equivalent to three months as compensation for such procedural unfairness. The offer was made with prejudice but was rejected by the applicant. The respondent seeks costs of suit in the event of this Court not awarding more than three months' compensation to the applicant.

Substantive fairness of the dismissal

- [4] In light of the applicant's concession that there was a general need to retrench within the Water Treatment Division, the issue of the substantive fairness of the dismissal is confined to the consideration whether there was a fair reason to retrench the applicant. It was also common cause that at some point in time the respondent's Water Treatment Division suffered a loss in the region of R20 million after tax.
- [5] The respondent led the evidence of Mr Johan Moolman (“Moolman” - the former Managing Director of the Water Treatment Division and the evidence of Mr Aiden Gotz (“Gotz

- the former Operations Director: Tailings Division and now the Senior Manager: International Operations of the respondent).

Bumping

- [6] According to Moolman, the respondent did not consider bumping the applicant into a position in one of the four divisions operated by the respondent because the divisions operated as separate business units. On behalf of the respondent it was conceded that whilst bumping is a possible alternative in the context of a retrenchment, such bumping should take place within a specific “universe” which in these circumstances should be the Water Treatment Division. It is also relevant to point out that, at the time when the applicant requested to be bumped into another position, he had already applied for the vacant position in the Tailing Division.
- [7] More important is the fact that the applicant contended that he could have been bumped into Mr Da Silva’s position. In this regard, the evidence of Moolman was that the applicant was not suitable for that position because he lacked the requisite product knowledge and experience to develop specific water treatment solutions for customers in the Water Treatment Division. In any event, Da Silva was also retrenched some three months after the applicant.

Vacant position

- [8] In respect of the vacant position it was the evidence of Gotz that the successful applicant for this position (Kgomo) was the more suitable candidate because he had more project management experience and that he was qualified in engineering, procurement and construction management (“EPCM”). His evidence was confirmed by the contents of an email of a certain Mrs Adele O’Callaghan in which she stated that the applicant was not the more suitable candidate. This position was advertised internally and externally.
- [9] It could not be disputed by the applicant that this position to which Kgomo was appointed was a three months fixed term contract and not a permanent position. Notwithstanding this fact, the applicant pleaded in his statement of case that he should have been offered this position. I will return to this point hereinbelow. Suffice to point out that should this Court ultimately decide that the applicant ought to have been offered the position; the applicant would in any event and have been employed in this position for a period of three months only. I have also pointed out that the respondent has already made a with prejudice offer to the applicant in respect of any unfairness relating to this appointment which the applicant rejected.
- [10] The respondent’s witnesses explained why Kgomo was the better candidate and did so with reference to an email of O’Callaghan. The applicant submitted that there is a fatal flaw in the case presented by the respondent in that it had failed to call Mrs Callaghan as a witness although she was available as a witness.

Procedural fairness

- [11] It should again be restated that the applicant has conceded that there was a general need to retrench. The applicant has also conceded under cross-examination that he was involved in the consideration of alternatives to the closure of Water Treatment Divisions. (I will refer in this regard to the process that was followed in more detail herein below.)
- [12] The applicant tried to convince this Court that he was completely unaware of the possibility that he may be retrenched. There is no merit in this assertion: Firstly, in an email dated 16 March 2014, he made a statement that can only mean that he was fully aware of the state of affairs in the Water Treatment Division and that he must have been aware that there was a possibility that he may be retrenched, namely, that 'You may know FAWT is not performing as anticipated on the implementation side, that I form part of, things are very quiet.'
- [13] Furthermore, the applicant also could not explain why he then applied for the vacant position on 16 March 2014 if he was unaware of the possibility of a possible retrenchment.
- [14] Regard must also be had to the procedure that was actually followed by the respondent: On 10 March 2014, Mr Moolman sent out an email to employees from the Water Treatment Division (including the applicant) to attend a special meeting on the same date. The applicant was unable to attend because he was at a site in Rustenburg. The minutes of the meeting reflect that a special board meeting was held with the shareholder and that it expressed its concern and dissatisfaction with the financial performance and prospects of the Water Treatment Division. The minutes also record a loss of R20 million after tax for 2014. An investment of R40 million also had to be written off. The minutes further reflect that the meeting was held in order for management to share the need for change in the business. The applicant subsequently received a copy of the minutes.
- [15] A second meeting was held with staff on 13 March 2014. The applicant was present at this meeting. At the meeting, the staff was informed that five alternatives were explored. The minutes reflect that the respondent considered the fourth option to be the most viable option, which was:
- 'Right size for sustainable-keep operations and focus on MR's competitive advantage in coal; fix & sell MT investment; recover R40m investment and retain priority access to MT technology.'
- [16] On 12 March 2014, the applicant applied for a position of Project Manager in the Tailing Division. I will return to this position as a possible alternative to retrenchment herein below.
- [17] A third meeting was held with staff on 18 March 2014. The applicant was present at the meeting. The minutes reflect that the chairperson extended an invitation for more alternatives to be presented and the need to discuss them with EXCO before arriving at a final decision. The slides used during this session are attached to the minutes.

- [18] On 24 March 2014, a fourth meeting was held during which a further slide show was presented. The fourth option namely the right sizing of the division was discussed and a new organogram for the Water Treatment Divisions was presented. The positions of, inter alia, the applicant (Technical Support) and that of Mr Da Silva were identified as being redundant. All in all, eight of the sixteen positions in the division were affected by the new structure. At the meeting, it was stated that the respondent would optimise the use of staff-members' expertise.
- [19] After this meeting, individual meetings were held with affected employees. At the individual meeting held with the applicant, the respondent furnished a section 189(3)-letter to the applicant in which it is stated, inter alia, that – (i) it was communicating its final decision in terms of the turnaround strategy; (ii) the applicant's position was redundant; (iii) the respondent would consult with the applicant before making a final decision regarding his future employment; and (iv) the next consultation meeting would be the next day, namely 25 March 2014. According to Moolman this meeting did not take place at the request of the applicant.
- [20] After this meeting, a series of correspondence were exchanged between the applicant and the respondent. In a letter dated 27 March 2014, the respondent confirmed to the applicant that his position had become redundant and that the respondent would consider all possible alternatives including re-deployment.
- [21] On 28 March 2014, the applicant furnished a further letter to the respondent in which the applicant requested to be provided with a list of all positions within the respondent across all five divisions irrespective of whether those positions were vacant in order for him to identify possible positions into which the respondent could bump him. In particular, the respondent asked for an organogram of each division. The applicant further confirmed that he had applied for the vacant position of project manager (Tailings) and confirmed that he was duly qualified for this position. This letter was followed up with a further letter stating that the respondent had not provided him with the required list and that the respondent was not entitled to declare his position redundant prior to complying with the provisions of section 189 of the LRA.
- [22] The respondent held a further meeting with the applicant on 2 April 2014. During this meeting the applicant again asked for the aforesaid organograms. The respondent informed the applicant that it refused to provide him with the said organograms as it would not consider any bumping.
- [23] On 7 April 2014 the applicant again sent a letter to the respondent in which he stated that the respondent was rendering his possible retrenchment procedurally and substantively unfair by failing to provide the aforesaid list of positions and by failing to consider bumping.

- [24] A further meeting took place between the applicant and the respondent on 10 April 2014. At this meeting Moolman confirmed that the interviews for the position of Project Manager (Tailings) were scheduled for 16 April 2014 and that the applicant had been shortlisted for the position.
- [25] On 14 April 2014 (prior to the applicant attending the interview) the applicant was informed by Moolman that the applicant had been afforded the opportunity to make representations and that the respondent had considered those representations. Moolman informed the applicant that no positions existed that matched the applicant's skills 'except maybe for the position of project manager that you have applied for' and that the applicant's skills could not be reasonably accommodated in the new structures of the Water Treatment and Tailings divisions. The applicant was also informed that he could not be bumped into alternate positions in the Water Treatment division. The letter further states that the consultation process had been exhausted in the opinion of the respondent and requested the applicant to revert in writing by 15 April 2014. Moolman testified that he had not for purposes of this letter investigated whether the applicant could be bumped into an existing position in the Tailings division.
- [26] On 6 May 2014 Moolman again wrote to the applicant informing him of the reasons as to why Kgomo was regarded as the better candidate for the position of project manager in the Tailings Division.

Evaluation

- [27] If regard is had to the evidence it is clear that the applicant adopted an uncooperative attitude towards the consultation process. In fact, the applicant made it clear in his evidence that he believed that Moolman was incompetent and unable to properly manage the affairs of the Water Treatment Division. The minutes of one of the consultation meetings also reflect that the applicant had lost his confidence and trust in the Water Treatment Division.
- [28] It is in my view clear from the evidence that the respondent did not take a unilateral decision to declare the applicant's position redundant. If regard is had to the process that was followed and the fact that a number of consultation meetings were held with the employees of the Water Treatment Division, it is clear that the respondent only took the decision to downsize the

Water Treatment Division after consultations and only after the respondent had considered the various alternatives in respect of the downsizing of Water Treatment Division.

- [29] Accordingly, it is concluded that the applicant's retrenchment, other than as was conceded by the respondent, was procedurally and substantively fair.

- [30] More in particular in respect of the refusal to bump the applicant into another position, I can find no unfairness in the respondent's refusal to do so. The applicant pleaded that he wished to have been bumped into the position of Da Silva. The respondent has given detailed evidence as to why Da Silva was the better candidate. I can find no reason to reject the evidence tendered on behalf of the respondent in respect of the position of Da Silva. Da Silva's was in any event also retrenched three months later.
- [31] In respect of the submission that the applicant ought to have been bumped into other divisions: Firstly, the evidence showed that the different divisions within the respondent operate independently. Secondly, during his evidence, the applicant was unable to identify into which position he should have been bumped into as an alternative position.
- [32] One last observation regarding the position of Kgomo. The applicant pleaded that he ought to have been offered the position of Kgomo. I have already pointed out that Kgomo was found to be the better candidate. Moreover, the position of Kgomo was in any event only a three months' fixed term contract. However, insofar as there may have been any unfairness in respect of the appointment of Kgomo, I award the applicant compensation equal to 3 month's salary.

Appropriate relief

- [33] I have already referred to the fact that the respondent has tendered an amount of three months' compensation in respect of any unfairness relating to the position of Kgomo. Although, I am satisfied that the retrenchment was fair, I award the applicant three months' compensation in respect of any unfairness that may have occurred during the appointment of Kgomo to the advertised position.

Costs

- [34] It cannot be concluded that the applicant was substantially successful with his case. In fact, he was offered an amount of three month's compensation with prejudice which he has rejected. The respondent submitted that the applicant should pay the respondent's costs. I have, however, in the interests of justice, decided to make no costs order. In respect of claim 2 the respondent is ordered to pay the costs.

Order

- [35] In the event, the following order is made:

35.1 The retrenchment of the applicant was substantively and procedurally fair except in respect of the filling of the position in the Tailing Division.

35.2 In respect of any unfairness relating to the position in the Tailing Division, the respondent is ordered to pay the applicant three months' compensation. In respect of claim 1 (the claim for unfair retrenchment) each party to pay its own costs.

35.3 In respect of claim 2 the respondent is ordered to pay the costs.

AC Basson, J

Judge of the Labour Court

Appearances:

For the Applicant: Dr G Ebersöhn of Gerrie Ebersöhn Attorneys

For the Respondent: Advocate MJ van As

Instructed by:

Webber Wentzel Attorneys

[1] Act No. 66 of 1995.

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Prepared on 11 October 2026 · Esheria