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SOUTH AFRICA / JUDGMENT

## Kalolo v Grinnell Security Services (C690/2019) [2022] ZALCCT 6 (28 January 2022) [2022] ZALCCT 6

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COURT

Labour Court Cape Town

BEFORE

Rabkin-Naicker

CASE / FILE NUMBER

C690/2019

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REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

C690/2019

In the matter between:

JEAN KALALA KALOLO

Applicant

and

GRINNELL SECURITY SERVICES

Respondent

Date heard: 8 and 9 September 2021 by means of virtual hearing

Delivered: 28 January 2022 by email to respondent and for collection by the applicant at Court by the Monday 31 January 2022.

RABKIN-NAICKER J

[1] This trial was heard by means of a virtual hearing. The parties were not legally represented and this meant that the proceedings were more akin to an arbitration than a formal trial in this court. The applicant claims that he was unfairly dismissed and seeks the following relief in his statement of claim:

1.1 Eight years of severance pay;

1.2 A bonus 'as promised';

1.3 Annual increase from 2017

` 1.4 12 months compensation

1.5 21 days leave pay

1.6 1500 uniform money.

[2] In the pre-trial minute, the parties agreed that the following facts were common cause:

2.1 The applicant was employed at the respondent since 19 March 2012;

2.2 The applicant was retrenched on 31 July 2019;

2.3 The respondent and applicant had 4 meetings to discuss and finalise the retrenchment;

2.4 Other employees at the office were also retrenched;

2.5 HR offered the Applicant a job working at the company Professional Concierge Services;

2.6 Professional Concierge Services is part of the Grinnell Group;

2.7 The Applicant was paid an amount of R13,868.73 on 31 July 2019.

[3] In his statement of claim filed at Court the applicant recorded that he had been retrenched due to operational requirements; that his position was made redundant; that an alternative position outside Grinnell Security Services Pty Ltd was offered to him with a different company (CC) with 'different statutory requirements' and a less favourable salary. He added that he was forcefully terminated.

[4] In the opening statement the applicant prepared for Court, he alleged that his dismissal was automatically unfair and he was discriminated against as a foreign national given that other employees who were retrenched got full retrenchment benefits. His claim had now increased to one of 24 months compensation. No basis for this was set out in the pleadings and this Court will determine the matter on the basis of an unfair retrenchment claim.

[5] The applicant relied on a number of documents in the trial including a letter which was written by him on the 26 June 2019 and reads as follows:

*"TO WHOM IT MAY CONCERN*

With reference to consultation with the Human Resource Manager on 24 June 2019, I was informed that the company is currently busy with a restructuring process and that my position is affected.

I have been appointed at head office as a porter and been in the position for 7 years. The HR informed me that the company has a

position as a concierge as an alternative to being retrenched.

I do not want to take this option as my position has been made redundant therefore is in line to be retrenched as by the law and is due to all retrenchment entitlements.”

[6] The last pay slip that the applicant received included an amount of R5000 referred to as ‘severance pay contract term’.

#### Evidence summary

[7] The general manager of the company Mr Janse van Rensburg (Van Rensburg) testified that he only joined the company in June 2019 and not involved in the consultation process with the then HR manager Mr Bester. When the consultation was finished he assessed the positions to be made redundant. He looked at the possibility of alternative employment. He said he did offer the applicant such an alternative position which he described as being exactly the same. He had told him that if he took the new position where he would work on a site he would earn R4800 plus overtime- as a Concierge he would earn the minimum wage under the BCEA and work 12 hour shifts Monday to Friday. The applicant told him he did not want to work on a site. The company

paid out his salary, annual bonus and leave pay, plus an amount of R5000 which he described as a gratuity. The other persons who were retrenched were administrative staff and there were no other administrative roles available. Under cross-examination he said he was part of the decision not to pay the retrenchment amount and only a gratuity because the applicant had refused to take up the alternative position.

[8] The applicant testified that in his job with the respondent he worked a 5 day week of 12 hours a day. He was at pains to point out in his testimony that the job he was offered as an alternative was with a different legal entity and that he would not be remunerated at the same rate or under the same conditions of employment and that his service with the respondent would be interrupted. He referred to documents regarding the concierge rate of pay. Concierge Services was part of a separate legal entity of the same employer. In addition, he would not receive his retrenchment pay. He emphasised that his was a permanent contract with the respondent.

[9] In his testimony, the applicant stated that he was owed 38 days in leave pay but was only paid eight. Under cross-examination, he was asked if he had any proof of the additional 30 days he was claiming and he stated that he was always called in to work when he was supposed to be taking leave. He testified that HR confirmed he was owed 38 days. He stated

that he did not accept his position was redundant as he did much more duties than simply being a porter. He also controlled the many employees wanting access to the head office. It was put to him that there was no longer a porter position and he said he did not know that as he wasn't there.

- [10] Mr Andries Bester (Bester) testified in support of the applicant's case. He had been the HR Manager of the company at the time of the termination of applicant's employment. In November 2018 there had been a termination of a contract with the City of Cape Town involving security officers provided by the respondent. He said he was asked to do a feasibility study of HR staff in the administration office. The applicant was part of the administration office. The outcome was 4 of the administrative staff would be affected. He and the general manager looked at what could be restructured. He consulted with all the staff to inform them and had a second consultation with the affected employees. All the employees subsequently received their retrenchment letters including the applicant. He read the letter into the record:

*"Dear Jean*

Further to my previous consultations sessions held, it is with regret to inform you that your role of Office Porter has been made redundant. This decision has been made based on various current business challenges, the economic downwards and the loss of various sites within the company. This has now resulted in that you will be retrenched effectively 31 July 2019.

This letter serves as Notice of Retrenchment, taking into account your notice period of one month as per your contract of employment This will take effect on 31 July 2019 and all monies due to you including you severance payment, salary, outstanding leave will be paid to you on 31 July 2019.

I want to take this opportunity to thank you for your service with the company and wish you all the best for the future."

- [11] He testified that despite the undertakings in the letter the applicant was not paid out as a retrenchee but as a person who resigned from the company. He testified he had made a retrenchment estimate for the GM and he took the schedule to him. He signed off the other three positions but scratched out the applicant saying that the applicant could get an alternative position with a separate company in the hospitality sector. Bester said he informed the applicant of this. The applicant told him he would go to the new company if he got paid out his severance package. The applicant met with the GM and he then advised that given he would not be getting his severance, he was not taking up the alternative offer.
- [12] Mr Bester stated that the respondent had four different companies under it all under different sectoral determinations. Head office staff fell under the BCEA conditions. Mr Bester stated that the applicant was dismissed on the grounds of making an unreasonable demand. Under cross-examination he stated that when the applicant was offered alternative employment under different terms and conditions of employment the respondent would not

pay the retrenchment package. The applicant's job was as a Porter which was a completely different job to that of a professional concierge, with different terms and conditions. Bester emphasized that he was HR manager for all of the companies and that admin staff had different terms and conditions and were paid from different budgets. He stated that the applicant would not have refused the alternative job if he had been paid out his severance first. Mr Bester confirmed that he had parted ways with the respondent and was involved in a dispute with it.

- [13] The crisp issue the Court has to decide was whether the applicant unreasonably refused the alternative employment offered to him. In my view he did not. The evidence before me was that such acceptance would have meant a break in the applicant's seven years of service, lower wages and conditions of service falling outside of the BCEA. The alternative would have involved shift work whereas he had been working in a Monday to Friday job in the respondent's head office. In *Irvin & Johnson Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2002) 23 ILJ 2058 (LC) Waglay J (as he then was) held that:

*"[20] Where therefore alternative employment is offered to employees who are to be retrenched and the employees' refusal of such offer cannot be construed as being unreasonable, but the employees nonetheless accept the offer (because the alternative is being unemployed), acceptance of such offer cannot be seen to lead to a forfeiture of severance pay, as provided for in s 41 of the BCEA."*

- [14] The applicant was prepared to accept the offer if he did not have to forfeit his statutory severance pay of one weeks' wage for every completed year of service. In as far as not being paid his outstanding leave pay, the applicant was unable to establish how many days he was due and his witness Mr Bester did not substantiate his claim. The other claims regarding promise of a bonus and an amount for his uniform were also not supported in evidence to a sufficient extent.
- [15] The respondent was not prepared to treat the retrenchment of the applicant as it did other admin employees and argued the applicant had unreasonably refused the alternative position offered. However, the termination was as a result of a restructuring and retrenchment process and the refusal of the company to provide the applicant with his statutory severance pay when he was prepared to take up the alternative job offer in question rendered the process unfair. The applicant should be awarded some compensation as a solatium for same.
- [16] The respondent insisted that the R5000 paid to the applicant was not severance pay but a gratuity which it paid out of generosity. I will not take that payment into account for the purpose of my order. His salary at the time of the dismissal was R5423 and he had worked for seven full years of service. I make the following order:

#### Order

1. The dismissal of the applicant was procedurally unfair.

2. The respondent is to pay the applicant his statutory severance pay being an amount of 7 x R1355.75 = R9 490.25. (Nine thousand four hundred and ninety rand and twenty five cents.)
3. The respondent is to pay the applicant compensation in an amount equivalent to three months' salary being 3 x R5423 = R 16269  
(sixteen thousand two hundred and sixty-nine Rand.
4. The amount of R25 759.25 (twenty five thousand seven hundred and fifty-nine rand and twenty-five cents) is to be made to the applicant by no later than February 28th 2022.

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H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

Applicant: in person

Third Respondent: HR Manager

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