

SOUTH AFRICA / JUDGMENT

Koprindjiyska v 80 Westcliff (PTY) LTD T/A Four Seasons Hotel (JS 994/20) [2022] ZALCJHB 325 (22 November 2022) [2022] ZALCJHB 325

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JS 994/20

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case

No: JS 994/20

In

the matter between:

SACHKA
KOPRINDJIYSKA
Applicant
And
80 WESTCLIFF (PTY) LTD
T/A FOUR SEASONS
HOTEL
First Respondent
WESTCLIFF
JOHANNESBURG
Second Respondent
Heard: 10 November
2022
Delivered: 22 November
2022
(This
judgement was handed down electronically by circulation to the
parties' legal representatives, by email, publication
on the
Labour Court's website and released to SAFLI. The date on which
the judgment is delivered is deemed to be 22 November
2022.)

JUDGMENT**VAN NIEKERK, J**

- [1] The applicant seeks an order to the effect that her retrenchment by the respondent was substantively and procedurally unfair.
- [2] The applicant was employed by the respondent (the hotel) on 7 February 2018, as a housekeeping supervisor. She was retrenched on 13 August 2020, after a consultation process initiated by a section 189 (3) letter issued by the hotel on 10 June 2020.
- [3] The applicant's statement of claim says little more than that the respondent failed to comply with section 189A of the LRA, and that her dismissal was procedurally and substantively unfair. The statement of claim was clearly excipiable on the basis that it is vague and embarrassing. The applicant has simply failed to comply with Rule 6(1)(b), which required her to set out a clear and concise statement of the legal issues that arise from the material facts, sufficiently in particular to enable the respondent to reply to the document. The semblance of a claim emerges from the pre-trial minute, where in response to the questions listed in the Practice Manual that require response in every dispute concerning an alleged unfair dismissal on account of an employer's operational requirements, the applicant disputes that there was a general need to retrench, she contends that there were alternatives to her retrenchment in the form of an international transfer to another Four Seasons Hotel, disputes the fairness of the selection criteria and in particular, contends that some employees were selected based on LIFO and others based on skills, contends that other persons should have been selected for retrenchment in her place and sets out the basis for her complaint of procedural fairness.
- [4] At the commencement of the trial, the applicant properly conceded that the retrenchment was governed by section 189A, and that it was thus not open to her to raise matters of procedural fairness, she having failed to do so at the relevant time in terms of section 189A (13). In relation to substantive fairness, and in response to the shortcomings in her pleadings, the applicant identified six issues that were identified as being in dispute. These related to the need to retrench the applicant in particular (as opposed to a general need to retrench), the fairness of the selection criteria adopted by the respondent, the assertion that bumping had been applied in respect of some employees but not others, the alleged inconsistent application of LIFO, the alleged failure to assist the applicant in relation to an international transfer, the availability of other jobs in the form of the post of assistant spa manager, and the assertion that the applicant had been identified for retrenchment as far back as March 2020, given that documentation relevant to her UIF claim recorded the date of dismissal as March 2020. I am indebted to the applicant's pro bono counsel and counsel for the hotel for their efforts in identifying the true issues in dispute and making sense of the overly broad

pleadings that were filed by the applicant.

- [5] The only witness to testify for the respondent was Ms Nokuthula Kamwendo, the respondent's director of people and culture. In her evidence, Kamwendo described the impact of the coronavirus epidemic on the respondent's operations from as early as February 2020. As a consequence, the respondent imposed a freeze on all new hiring, given the then rapidly developing crisis occasioned by the pandemic on a global scale and in particular, the beginning of a consequential reduction in world travel and consumer spending. The impact of Covid-related restrictions on the respondent, placed as it is in the upper end of the market with particular appeal to international travelers, was devastating. The hotel closed at the commencement of the lockdown on 27 March 2020 and by June 2020, when the section 189
- (3) letter was issued, had received no revenue to speak of for almost three months, with little prospect of the resumption of a revenue stream in the foreseeable future. Kamwendo gave uncontested evidence regarding room occupancy levels from the commencement of the lockdown in March 2020 to the date of the applicant's retrenchment. This established that the hotel had not been able to generate any significant revenue. The prognosis remained bleak – at the time the consultations commenced, the hotel contemplated re-opening at some future stage on a vastly reduced scale. Kamwendo testified that the restructuring of the hotel's operations contemplated a reduction in the number of rooms from 117 to 80, and a reduction in the number of restaurants from four to one. Divisional heads were to identify the number of employees required in each department to populate the revised structure. In consequence, and after two rounds of voluntary retrenchment offers, the hotel contemplated selecting some 77 employees for retrenchment. Consultations which staff identified as affected by the proposed retrenchment commenced on 16

June 2020. A total of five consultation meetings were held with the applicant, on a one-on-one basis, between 16 June 2020 and 5 August 2020.

- [6] Kamwendo testified that the hotel had discussed the selection criteria to be applied, and that although initial consideration was given to both LIFO and the application of skills and experience (as reflected in paragraph 5 of the section 189 (3) letter), a decision was taken to apply LIFO by department, across the hotel, with length of service defined to mean total length of service with the hotel. Kamwendo testified that the application only of skills and experience would have proved disruptive, and unfair. The hotel employed persons with a wide array of skills, and to try to differentiate between them on the basis of skill may have led to subjectivity in the selection process.
- [7] For the housekeeping department, comprising a director of rooms, an executive housekeeper, housekeeping supervisors and guest attendants.

- [8] In the case of the applicant, who was employed as a housekeeping supervisor, the number of employees in that job function was to be reduced to two. One of the incumbents (Ms Msibisi) had opted for voluntary retrenchment. Of the four that remained, the two with longest service in the hotel were Ms Ndimma and Ms Kabini. They were both employed by the hotel on 24 November 2014; and promoted from guest attendants to housekeeping supervisors on 1 November 2019 and 1 November 2018 respectively.
- [9] On this basis, the applicant was identified for retrenchment, she having less service with the hotel than either Ndimma and Kabini.
- [10] In her testimony, the applicant addressed specific grounds on which she believed her retrenchment to be unfair. First, she contends that had the hotel taken into account her skills and qualifications, she would not have been selected for retrenchment given that she was capable of performing the jobs of employees retained in other departments, who had less service than her. As the applicant put it in her testimony: 'Why am I being retrenched when there are jobs in the hotel held by other people with less service, whose jobs I can do?' In particular, the applicant pointed to the concierge, front office supervisor and guest relations manager, all of whom had less service with the hotel, and whose jobs the applicant contended she was appropriately qualified and sufficiently experienced to do. Secondly, the applicant contended that the two housekeeping supervisors that were retained had been promoted into those positions after the applicant was employed. The applicant testified that she had trained the two incumbents, and that LIFO ought to have been applied on the basis of years of service within the affected department, and not years of service with the hotel. Thirdly, the applicant testified that an international transfer was a viable option. She stated that she had applied for two positions at group hotels overseas, but that she required the consent of her supervisors to complete the application, which consent was not forthcoming. Fourthly, the applicant contends that she offered to take annual leave that had accrued to her to bridge the period between the restructuring and a return to normal operations. The hotel did not agree to this option, nor did it agree to the options of short hours or work sharing that she proposed. Finally, the applicant suggested that the consultation process had been undertaken in bad faith, and that the hotel never had any serious intention of reaching consensus.
- [11] The applicable legal principles are clear. A substantively fair dismissal on account of an employer's operational requirements includes the requirement that there be some commercially defensible rationale for the retrenchment and that the selection criteria that applied are either agreed with the other consulting ability or, if no criteria have been agreed, criteria that are fair and objective (section 189 (7)).
- [12] I did not understand the applicant to contest the need to retrench in a broad sense. Her case is not that the decision to retrench was commercially irrational or otherwise without justification; in essence, she contends that she ought not to have been selected for retrenchment either because her skills and qualifications enabled her to do the jobs of other

employees with less service with the hotel, or because she had more service in the department in which she was employed. The former contention raises the relevance of skill and qualification as a selection criterion; the latter contention raises the manner within which LIFO was applied.

[13] The LRA does not compel the adoption and application of any particular criterion for selection for retrenchment. It requires only that in the absence of agreed criteria, the employer apply criteria that are 'fair and objective'. That is a broad remit, and admits a number of potential criteria, many of which may be justifiable in relation to prevailing circumstances. For example, the court has upheld selection criteria based on performance, verified by objective standards (see *NUM & others v Anglo American Research Laboratories (Pty) Ltd* [2005] 2 BLLR 148 (LC)). As Prof Rochelle le Roux observes 'The way in which LIFO is applied can lead to vastly different results. Ultimately, the question remains whether it is applied in a fair and objective manner' (*R le Roux Retrenchment Law in South Africa* (Lexis Nexis 2016)). Put another way, while an employee has the right to influence the employer's decision on the selection criteria to be applied, the employee has no right to insist that any particular criteria applied, provided that those ultimately applied meet the test of fairness and objectivity.

[14] A case to which Prof le Roux refers resonates closely with the present. In *SA Commercial Catering & Allied Workers Union & others v Sun International SA Ltd (A Division of Kersaf Investments Ltd*

(2003) 24 ILJ 594 (LC), a hotel group retrenched employees at several of its hotels on account of declining revenue. The employer applied LIFO by hotel, by department, by job category. The union argued that LIFO ought to have been applied across the board in each hotel. The court held that there was no reason to conclude that the criteria applied by the employer were not fair and objective. At paragraph 22 of the judgment, the court said the following:

If it is accepted, as the union accepts, that the respondent was facing serious financial difficulties which required to cut costs by reducing staff numbers, it seems to me that it was not inappropriate or unfair for the respondent to have identified the number of employees in each job category at each unit whose services it could most afford to lose and then to subject on the basis of applying LIFO within such job categories. In my view this was both a fair and objective approach.

[15] In the present instance, two issues arise – first, the fairness of excluding skills and experience as a criterion for selection; secondly, the definition of the unit within which LIFO was to apply as the department. Both issues were the subject of extensive consultation with the applicant. In regard to the first, the retention of skills and experience is in principle fair and objective, subject to the objectivity of the process adopted to verify them. To the extent that the applicant contends that the hotel was obliged to apply skills and experience (and thus place her in an alternative position occupied by an employee with less service for

which she had the appropriate skills and experience) it is not for an employee to insist on the application of criteria that happen to favour him or her; the obligation rests on the employer to apply criteria that are fair and objective and which best meet its legitimate operational interests. Put another way, there was no obligation in law for the hotel to apply skills and experience as selection criteria, and the fact that it did not may have had personally prejudicial consequences for the applicant, but it was not unfair.

- [16] In regard to the second issue (the unit within which LIFO was applied), the hotel explained the rationale for applying LIFO on that basis. Again, there is no single right answer. For example, had the hotel applied LIFO by reference to length of service in the relevant department, the applicant may not have been selected for retrenchment, but it would have been open to Ndima and Kabini to contend that their selection was unfair, on the basis that length of service with the hotel ought properly to have been applied. (See *Chemical Energy Paper Printing Wood & Allied Union on behalf of Gumede & others v Republican Press (Pty) Ltd* (2006) 27 ILJ 335 (LC), where the court pointed out the potential abuse inherent in applying LIFO by department rather than by length of service across the entity engaged in the retrenchment exercise.)
- [17] In so far as the applicant contends that her retrenchment was unfair on account the alleged failure by the hotel to assist her in relation to an international transfer, Kamwendo testified that any application for an international transfer could be made in accordance with group policy, but that each hotel within the Four Seasons group was ultimately responsible for its own recruitment and selection. As such, it was not open to the hotel to initiate or effect any international transfer. In any event, as Kamwendo testified, the Covid pandemic had affected the hospitality industry world-wide, and employment opportunities had been severely curtailed. In her evidence, the applicant's main complaint appeared to be that her direct supervisors had not consented to any transfer, a step necessary in the process of any application for an international transfer. Kamwendo testified that she had no knowledge of any application made by the applicant for a position elsewhere in the group. There is no reason to reject Kamwendo's evidence that it was for the applicant to have approached her to secure whatever consent or acknowledgment required in respect of any application for transfer, but that it was ultimately for the applicant to make the application to transfer to a hotel in the group of her choice. The applicant adduced no evidence to the effect that the hotel's management had withheld its consent to any international transfer that she had pursued or intended to pursue.
- [18] During the consultation process, the applicant raised the post of assistant spa manager as a viable alternative to retrenchment. Kamwendo testified that the applicant had applied for this position prior to the hiring freeze implemented in February 2020. The position was no longer available since it was not intended that the spa be operational, at least for the foreseeable future, especially on account of Covid-related protocols that attached to the operation of the spa. In any event, on account of the hiring freeze, the applicant had not actually been offered the position. I did not understand the applicant to dispute this

evidence. In so far as the applicant asserts that she had been identified for retrenchment as far back as March 2020, given that documentation relevant to her UIF claim recorded the date of dismissal as March 2020, this was never pleaded by her as a basis for a substantively unfair dismissal, nor was any assertion to this effect ever put to Kamwendo.

- [19] In summary: The LRA is not prescriptive on the matter of selection for retrenchment. It requires only that the selection criteria adopted by the employer are fair and objective. The application of LIFO can have vastly different consequences for individual employees potentially affected by a retrenchment. Employees have no right to require that particular criteria, the application of which would be favourable to them, must be adopted. Ultimately, it is for the employer to make a decision that is best consistent with its legitimate business interests. Selection on the basis of LIFO based on length of service with the hotel rather than the department in which the applicant was employed was not inherently unfair; nor was it inherently unfair to apply LIFO in the absence of consideration of skills and experience. The applicant's dismissal was thus substantively fair.
- [20] In regard to costs, the court has a broad discretion to make orders for costs according to the requirement of the law and fairness. The hotel seeks costs on a punitive scale, on the basis that the applicant's referral amounted to an abuse of the process of this court. The formulation in section 162 has the result that in this court, costs do not necessarily follow the result, and that the court's discretion is a broad one, the exercise of which must take into account all relevant facts and circumstances. The institution of the present proceedings was misguided. The applicant appears to have read a few on-line articles published by local law firms, and drawn her own mistaken conclusions as to the nature and extent of an employer's obligations when retrenchment is contemplated. I will give the applicant the benefit of the doubt and accept that she approached the court in good faith, being genuinely aggrieved by the decisions made by her employer, which resulted in the termination of her employment. In these circumstances, the requirements of the law and fairness are best met by each party bearing its own costs.
- [21] Finally, as I have indicated, an imprecisely pleaded case was reduced to a more concise list of issues in dispute after intervention by the parties' legal representatives. The court is indebted to the attorney and counsel who represented the applicant pro bono during the trial.

I make the following order:

1. The applicant's referral is dismissed.

André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the applicant:

L Mosala (pro bono)

Instructed by:

SASLAW Pro Bono Office

For the respondent:

M Edwards

Instructed by:

Attorneys

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Prepared on 10 October 2026 · Esheria