

SOUTH AFRICA / JUDGMENT

Mokgodi v Travelex Africa Foreign Exchange (Pty) Ltd (JS664/15) [2018]

ZALCJHB 310 (2 October 2018)

[2018] ZALCJHB 310

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhamajane

CASE / FILE NUMBER

JS 664/15

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 664/15

In the matter between:

SEFUFU JEFFREY

MOKGODI Applicant

And

TRAVELEX AFRICA FOREIGN EXCHANGE
(PTY) LTD Respondent

Heard:

26 February 2018

Delivered: 2 October 2018

JUDGMENT

TLHOTLHALEMAJE, J.

Introduction:

- [1] In his statement of claim, the applicant, Mr Sefufi Jeffrey Mokgodi (Mokgodi), challenged the substantive fairness of his dismissal based on the operational requirements of the respondent, Travelex Africa Foreign Exchange (Pty) Ltd (Travelex). Travelex opposed Mokgodi's claim.

Background:

- [2] Mokgodi was previously employed at another retail entity as General Manager: Financial Services. During August 2014, he was headhunted and offered the position of Head of Retail by Travelex. Having accepted the position, he commenced his employment with effect from 1 September 2014, and reported directly to the Chief Executive Officer (CEO) of Travelex.
- [3] On 17 March 2015, Mokgodi received a notice in terms of the provisions of section 189(3) of the Labour Relations Act (LRA),[1] which inter alia recorded that Travelex was contemplating dismissing him on account of his position having become redundant [2].
- [4] The reasons for the contemplated dismissal based on Travelex's operational requirements included financial pressure brought about by the economic climate and trading conditions; the need to align Travelex's organisation design and review its management and support structures; improved efficiency and reduced management overheads.
- [5] In the notice, it was further indicated that several alternatives were implemented including a four month cost and expenditure rationalisation; a moratorium on the hiring of new employees effective from December 2014; launching of new staff initiatives aimed at improving revenue and new promotional campaigns. It was further indicated that in the last 12 months prior to the notice, six employees had been dismissed.
- [6] The notice also listed other positions that were to be affected by the restructuring process, including that of Head of Retail. Attached to the notice was Travelex's proposed new organisation structure, in terms of which the position of Head of Retail was abolished.
- [7] Travelex requested a facilitation by the Commission for Conciliation Mediation and Arbitration (CCMA) on 19 March 2015, further pointing out that the contemplated dismissals were as a consequence of a loss of a major contract at OR Tambo International, which constituted an average 50% of its revenue; the company's financial performance being below par for a variety of reasons, a forecast of R6m loss for 2015; and the need for effective structure alignment.
- [8] On 13 April 2015, a consultative meeting was convened and facilitated by a Commissioner appointed by the CCMA. In that meeting a proposal was made and accepted that the employees would elect three individuals to act as the representatives of the affected employees. The consultation process was extended to 22 May 2015 and further dates were scheduled. During the consultation process, Mokgodi had requested that he be consulted separately from others, which request was denied by the facilitating Commissioner.
- [9] Mokgodi subsequently requested a private meeting with the CEO of Travelex. In that meeting it was pointed out to him that in terms of the contemplated redesigned organisational structure, the position of Retail Head would be abolished and that in its place, two positions of Regional Retail Managers would be established. The one position would be

dedicated to the inland operations, whilst the other would be dedicated to coastal areas of the Republic. The CEO also advised Mokgodi that he should fully participate in the agreed facilitated consultation meetings, and further that it would be unfair to run a parallel consultation process dedicated only to him.

[10] On 15 June 2015, other employees affected by the restructuring process reached a settlement agreement with Travelex,

in terms of which there was consensus on the termination of their services, service pay and other statutory payments. Travelex also made certain and specific undertakings in favour of the employees i.e. conditions for re-employment.

[11] Mokgodi was not party to the settlement agreement. On 28 May 2015, a draft settlement agreement was handed to him, the terms of which he would be paid severance pay and other statutory payments due to him. He refused to sign the draft settlement agreement on the basis that he did not agree with certain clauses of the draft agreement, and further since he would be seeking legal advice as his dismissal was unfair[3]. His services were then terminated on 30 June 2015, following a notice of termination issued on 31 May 2015.

[12] On 30 September 2015, Mokgodi referred an unfair dismissal dispute to the CCMA and after attempts at conciliation failed, the dispute was referred to this Court for adjudication.

The evidence:

[13] Travelex led the evidence of its CEO Mr Kananelo Makhetha (Makhetha) which is summarised as follows:

13.1. Travelex main business model is the buying and selling of foreign currencies to businesses and/or social travellers. Its other component is remittance business which entails the transactional transfer of money by foreign nationals (who resides in the Republic for work, business or other reasons), to other persons in foreign territories.

13.2. Makhetha was appointed to the position of CEO of Travelex in October 2014. Like Mokgodi, Makhetha was also headhunted and employed with his specific mandate from the board being to immediately implement measures to prevent further financial loss in Travelex. At the time of his employment, the company's finances were essentially in a parlous state.

13.3. In consultation with the Human Resource Department, Makhetha had initiated a restructuring process aimed at turning the company around, to enhance its revenue, and minimise the financial losses.

13.4. The financial results and position of the company were not in dispute. As part of the restructuring measures, Makhetha considered reducing the number of positions in the Head Office. One of the positions identified was that of Head of Retail (the position occupied by Mokgodi), together with those of the two Deputy Heads of Retail. Those three positions were to be condensed into two, being Retail Managers inland and coastal.

13.5. On 17 March 2015, a notice was issued advising employees of the intended retrenchment process and inviting them for consultations. At the conclusion of the retrenchment process a total of 12 employees had their services terminated.

13.6. At the time that Makhetha commenced his employment, Travelex had submitted a tender in respect of a contract with Airports Company of South Africa (SOC) Ltd (ACSA) at OR Tambo International Airport (OR Tambo) to retain premises where its branch operated. The tender bid was unsuccessful, and Travelex had instituted legal proceedings to review the decision. Pending the review application, a decision was then taken to embark on the restructuring process, including closing down the OR Tambo Airport branch, which had continued to be operational pending the review application.

13.7. Makhetha confirmed that the facilitated consultations resulted in a settlement agreement being concluded between Travelex and the affected employees. Mokgodi had however approached him to seek a “private” facilitated consultation process on the basis he had been recently employed by Travelex, and further since the company ought to have been aware of its intentions to abolish the position of Head of Retail prior to it being offered to him. Makhetha held the view that such request would render the entire retrenchment process unfair.

13.8. During that period, Travelex was successful in its application to review and set aside the awarding of the OR Tambo contract to another entity. This resulted in the retrenchment exercise at the OR Tambo office being abandoned as it continued to be operational.

13.9. In respect of other employees at head office however, a settlement agreement was concluded. Mokgodi’s view however remained that he was not bound by the settlement agreement, contending that he was treated unfairly by Travelex.

13.10. Subsequent to the restructuring process, Travelex is reported by have made a profit and had achieved a costs saving of approximately six million rand.

13.11. According to Makhetha, the employees who held the two positions of Deputy Head of Retail submitted their applications for the new positions of Regional Retail Managers (Inland and Coastal). Their applications were successful. Mokgodi on the other hand had informed Makhetha that he would not apply for any position within Travelex.

[14] Mokgodi’s testimony is summarised as follows:

14.1. Having been headhunted and appointed as Head of Retail, he had been informed prior to his appointment that the purpose of his position would be to enhance the strategic approach of Travelex and to design strategic plans in order to ensure that the company was profitable.

14.2. He held the view that his retrenchment was unfair as he was lured from his previous employment, notwithstanding the fact that Travelex knew that it was already in dire financial state, and that his dismissal took place within a very short space of time after his appointment.

14.3. When Travelex initiated its retrenchment process, 'he was viewed as nothing but a costs saving measure', and his personal circumstances as an individual were not taken into consideration.

14.4. In his view, the OR Tambo branch constituted an important component of the business and its closure would have had profound consequences. In the end, the OR Tambo branch was not closed down, and this had assisted Travelex to keep afloat. In that respect, he expected that he would be recalled back to his employment.

14.5. Under cross-examination, Mokgodi conceded that he joined Travelex voluntarily, but contended that he was not aware that it was a loss making entity. He further conceded that during August 2014, he became aware that Travelex was not making a profit. He acknowledged that it was incumbent upon the CEO to turn the business around, which he had done by reducing the Head Office personnel.

14.6. When cross-examined on the reason why he had elected not to apply for any of the two positions of Regional Retail Manager, his response was that at the time those positions were made available, he was on leave of absence. On his return to work, those positions were already occupied by his former deputies.

Issues

for determination and evaluation:

[15] Central to this dispute is whether the dismissal of Mokgodi was substantively fair in the sense of whether sufficient reasons existed for his dismissal; whether his position was redundant necessitating the need to retrench him; whether Travelex had considered

alternatives prior to the dismissal; and whether proper consultations were held prior to his dismissal.

[16] Mokgodi had further contested the procedural fairness of his retrenchment, contending that no proper consultations were held and that the notice had not met the requirements set out in section 189(3) of the LRA. The issue that arose in this instance was whether the provisions of section 189A of the LRA were applicable, and whether Mokgodi was permitted to contest the procedural fairness of his retrenchment when the provisions of section 189A(13) found application. At the commencement of the trial proceedings however, the allegation of procedural unfairness was no longer pursued. This was a wise move in view of the authoritative decision in *Steenkamp and Others v Edcon Limited*[4].

[17] What remains in dispute is the substantive fairness of the retrenchment, meaning whether there was a fair reason to retrench related to Travelex's operational requirements. The basic requirements for substantive fairness[5] entails that the retrenchment must be based on the employer's economic, technological, structural or similar needs and no other untoward reason; the dismissal must have been operationally justifiable on rational grounds and based on reasons that would be objectively defensible; the employer must have properly

considered all available alternatives to dismissal, and demonstrate that a dismissal was the only available option[6], and last, the employer must have adopted a selection criteria that was fair and objective.

[18] The above requirements are to be taken into account, bearing in mind that the employer was entitled to choose the manner in which it runs its business, provided that it did not change the terms and conditions of employment of the employees without their consent[7]. In the end however, it is for the Court to determine whether the decision to dismiss is reasonable and fair, not only when viewed from the perspective of the employer's operational needs or desires, but also whether it is objectively reasonable and fair to the affected worker[8].

[19] The onus to establish the fairness of the dismissal is on the employer. In accordance with the parties' signed pre-trial

minutes, Mokgodi conceded that there was a general need to retrench. He however contended that he should not have been retrenched as Travelex failed to consider whether his position was objectively redundant.

[20] There are several difficulties with Mokgodi's case. To the extent that he had conceded that there was a general need to retrench, he cannot in the same vein, nonetheless argue that he should not have been retrenched. More than that mere averment is required.

[21] Travelex's position however was that based on its operational requirements following the restructuring, Mokgodi's position was found to be redundant as a result of creation of a new structure. Furthermore, it was not in dispute that the Head Office personnel, including Mokgodi, acted more as support structure, and further that the head office was overpopulated, necessitating a reduction. These are issues that were not seriously contested during the trial proceedings.

[22] Mokgodi's allegations of unfairness are clearly not based on Travelex's operational requirements or the manner with which the dismissal was effected, but on his own personal circumstances. At most, he had conceded under cross-examination that as a result of these personal factors, he should have been exempted from retrenchment. His evidence was that he was aggrieved by the fact that he was headhunted, employed and dismissed within a short period of time. As a result of his dismissal, he and his family (including his extended family), were severely and financially prejudiced.

[23] One can appreciate Mokgodi's source of grief, and to a large extent I agree that what happened to him when he had secure

employment at his previous place of employment can prima facie be considered to be unfair. However, that unfairness does not have anything to do with the decision to declare his position redundant.

He had conceded that there was a need to retrench, and the fairness thereof can only be determined in accordance with the four

requirements set out in Woolworths. His personal circumstances are important factors to be considered only in the event that he may be entitled to some form of relief.

[24] It was further not seriously disputed that the vast majority of 19 positions affected by the restructuring process, including that of Mokgodi, were based at the head office. Only five out of 24 positions at the OR Tambo office were affected. Ultimately, 12 employees from head office including Mokgodi were retrenched. It was also not disputed that following the consultation process and the settlement agreement with other employees, a special provision was made for those employees based at the OR Tambo office pending the review application, and there was an agreement to the effect that should the review be successful, those employees would not be retrenched, and that if the office was to close down as a result of the unsuccessful review, they would be retrenched.

[25] The OR Tambo office was Travelex's lifeline, and Mokgodi's contention was that once that office was retained and because it had generated an income, he assumed that he would be recalled. When it was nonetheless put to him under cross-examination that Travelex suffered a R4.2m (R6m) loss even when that office continued to operate prior to the completion of the restructuring process, he could not proffer an answer. He further conceded that the retrenchment process taking place at the head office had nothing to do with the then status of the OR Tambo office.

[26] What is fatal to Mokgodi's case however is that where he had alleged that he should not have been retrenched despite Travelex's parlous financial state, he did not state what the alternatives were and what position in the OR Tambo office or even head office, should have been considered for him. At the opposite end, he had conceded that he was informed of the two positions created subsequent to the restructuring process. Makhetha's undisputed version was that Mokgodi informed him that he would not apply for any of the positions. It follows that his contention that he was on leave when the positions were made available and that they were already filled when he came back does not take his case any further. Those positions were available to him, he was made aware of them and given his seniority, it is more than probable that had he applied like others, he would not have found himself in the position he is currently.

[27] It was further common cause that Mokgodi was party to the consultation/facilitation process and at some point, sought to be

treated differently. Again, his reasons in that regard were personal and had nothing to do with the fairness of that process. In my view, to the extent that a settlement agreement was reached with other employees who were in a similar position as Mokgodi, there can be no basis to conclude that the process was unfair to him or that there was an obligation on Makhetha to consult with him separately because of his own personal circumstances.

[28] Having had regard to the evidence, , I am satisfied that Travelex had a genuine need to retrench, based on its economic, structural and overall operational requirements. The dismissal of Mokgodi was therefore operationally justifiable and was based on reasons that were objectively defensible. To the extent that the consultation process was facilitated by the CCMA leading to a settlement agreement, I am further satisfied that all available alternatives to dismissal were properly considered, that a fair and objective selection criterion was adopted, and that ultimately, the dismissal of Mokgodi together with those of others was fair and reasonable, and a measure of the last resort.

[29] What remains to be determined is the question of costs. It was submitted on behalf of Travelex that costs in this case were

warranted as the claim had no merit in the first place. I agree that the claim had no merit. I have however had regard to the requirements

of law and fairness, and it is my view that any other employee who was headhunted, appointed and dismissed within a period of ten months would have been gravely aggrieved. These are not factors pertinent to the overall consideration of fairness in this case, but it is my view that it would however be iniquitous and remiss of the Court to ignore them for the purposes of determining whether a cost order is warranted.

[30] Accordingly, the following order is made;

Order:

1. The dismissal of the Applicant on account of the Respondent's operational requirements was substantively fair.
2. There is no order as to costs.

E. Tlhotlhlalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Adv. H. Bucksteg

Instructed by: Carel J Schoeman Incorporated

For the Respondent: Mr S. Snyman of Snyman Attorneys

[1] Act 66 of 1995, as amended

[2] Which recorded inter alia that: "... Due to the fact that it is contemplated that your current position may become redundant if the new structure is implemented which may lead to your retrenchment, the time has unfortunately now arrived for us to commence with a consultation process in terms of section 189A of the Labour Relations act 66 of 1995 ("as

amended”). It is accordingly necessary in such circumstances to consult with you regarding the possible retrenchments, on issues as detailed below. We wish to confirm that none of these issues have been finally determined. The company’s final decision would depend on such representations you may make. ... The reason why the company is contemplating the retrenchment? As already mentioned, the current economic climate and trading conditions as well to align the company’s organisation design accordingly, has forced Travellex Africa to review the company’s management and support structure...”

[2] Which recorded inter alia that:

“...

Due to the fact that it is contemplated that your current position may become redundant if the new structure is implemented which may lead to your retrenchment, the time has unfortunately now arrived for us to commence with a consultation process in terms of section 189A of the Labour Relations act 66 of 1995 (“as amended”). It is accordingly necessary in such circumstances to consult with you regarding the possible retrenchments, on issues as detailed below. We wish to confirm that none of these issues have been finally determined. The company’s final decision would depend on such representations you may make.

...

The reason why the company is contemplating the retrenchment?

As already mentioned, the current economic climate and trading conditions as well to align the company’s organisation design accordingly, has forced Travellex Africa to review the company’s management and support structure...”

[3] The clause of the draft settlement agreement that the applicant did not agree with recorded the following: “...

4. SETTLEMENT This agreement is entered into in full and final settlement of all claims of any nature whatsoever arising from the termination of the employment of the employee with the company.
5. GENERAL 5.1 This agreement shall constitute the entire contract between the parties who by their signature hereby acknowledge that no representations have been made or warranties given or conditions or stipulations attached to any of the matters referred to in this agreement. No variation of this/other agreement shall be of any force or effect unless recorded in writing and signed by or on behalf of the parties by the representatives duly authorised thereto. 5.2 The terms and conditions of this agreement are confidential between the parties and shall not be disclosed to anyone else. Any disclosure in violation of this section shall be deemed a material breach of this agreement.

[3] The clause of the draft settlement agreement that the applicant did not agree with recorded the following:

4. SETTLEMENT

This agreement is entered into in full and final settlement of all claims of any nature whatsoever arising from the termination of the employment of the employee with the company.

5. GENERAL

5.1 This agreement shall constitute the entire contract between the parties who by their signature hereby acknowledge that no representations have been made or warranties given or conditions or stipulations attached to any of the matters referred to in this agreement. No variation of this/ other agreement shall be of any force or effect unless recorded in writing and signed by or on behalf of the parties by the representatives duly authorised thereto.

5.2 The terms and conditions of this agreement are confidential between the parties and shall not be disclosed to anyone else. Any disclosure in violation of this section shall be deemed a material breach of this agreement.

[4]

(2016) 37 ILJ 564 (CC); 2016 (3) BCLR 311 (CC); [2016] 4 BLLR 335 (CC); 2016

- (3) SA 251 (CC) at para [31], where it was held that; “Section 189A expressly limits the disputes that can be referred to the Labour Court. Only those concerning a fair reason for the dismissal can be referred – in other words disputes about substantive fairness. Both referral options

expressly impose a time bar. Disputes about procedure under section 189A cannot be referred to the Labour Court by statement of claim, but must instead be brought by the speedier means of motion proceedings.” (Citations omitted)

[4]

(2016) 37 ILJ 564 (CC); 2016 (3) BCLR 311 (CC); [2016] 4 BLLR 335 (CC); 2016

- (3) SA 251 (CC) at para [31], where it was held that;

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expressly impose a time bar. Disputes about procedure under section 189A cannot be referred to the Labour Court by statement of claim, but must instead be brought by the speedier means of motion proceedings.” (Citations omitted)

- [5] See Woolworths (PTY) Ltd v SACCAWU and Others [2017] 12 BLLR 1217 (LAC); (2018) 39 ILJ 222 (LAC) at para [3]

- [6] CWIU v Algorax (Pty) Ltd

[2000] 11 BLLR 1081 (LAC) paras 69 – 70; NUM and another v Black Mountain Mining (Pty) Ltd
[2014] ZALAC 78

[7] Forecourt Express (Pty) Ltd v SATAWU (2006) 27 ILJ 2537 (LAC) para 39

[8] BMD Knitting Mills (Pty) Ltd v SACTWU [2001] 7 BLLR 705 (LAC) para 19

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