

SOUTH AFRICA / JUDGMENT

Munro v Pride Milling (Pty) Ltd (D277/14) [2016] ZALCD 4 (25 February 2016)

[2016] ZALCD 4**COURT**

Labour Court Durban

BEFORE

Cele

CASE / FILE NUMBER

D277/14

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Source record**IN****THE LABOUR COURT OF SOUTH AFRICA****HELD****AT DURBAN****Case****No: D277/14****DATE:**

25 FEBRUARY 2016

Not

Reportable

In

the matter between:

BARRY

MUNRO.....Applicant

And

PRIDE

MILLING (PTY)

LTD.....Respondent

Heard:

30 October 2013

Delivered:

25 February 2016

Summary:

Claim of unfair dismissal of the applicant due to operational requirements of respondent following closure of branch – termination not proved to be a retrenchment – applicant resigned.

JUDGMENT

Cele J

Introduction

- [1] This is a claim of unfair dismissal of the Applicant by the Respondent due to its operational requirements in terms of section 189 (3) of the Labour Relations Act.[1] The Respondent opposed the claim by contending that the Applicant resigned from his employment.

Factual

Background

- [2] The Applicant was an employee of the Respondent from 1996 to 2013 and therefore for a period of approximately 17 years. The Applicant was based at the Respondent's offices in Pietermaritzburg, KwaZulu-Natal. In 2013 he was the most senior employee of the Respondent. He reported to senior management in Respondent's Head Offices in Nigel, Gauteng Province. In Pietermaritzburg he worked with Ms Derasha Pullen, Mr Deon Pillay and Ms Maya Bhagelu. The Pietermaritzburg team had a feeling in 2013 that their stock sales were not doing very well. One of their colleagues, a Manager Mr Gert De Bruin, had even transferred from Pietermaritzburg to Nigel in 2012 due to concerns on the viability of the business operations of the Respondent in Pietermaritzburg.
- [3] On 9 May 2013, Mr De Bruin came down from Nigel to the Pietermaritzburg Branch and conducted a meeting with the staff. During that meeting the Applicant and the three other staff members of the Pietermaritzburg Branch were informed that the Respondent would be closing its Pietermaritzburg Branch and that the Pietermaritzburg employees had to choose between being transferred to Nigel or to be retrenched. Minutes of that meeting were captured. They bear no indication of what time frames were given to the staff to make their election.
- [4] At the meeting Ms Pullen indicated that she could not leave KwaZulu-Natal as she could not uproot her family. Accordingly, she elected to be retrenched and to be paid her retrenchment package. Mr Pillay elected to be transferred to the Nigel Branch. Ms Maya Bhagelu elected to be transferred to Nigel and was transferred but later changed her mind, after spending some time in Gauteng. She indicated that she did not wish to continue her employment in Nigel. She wanted to be retrenched but was told by the Respondent that her termination had to be a resignation as she had accepted a transfer. The

Respondent told her to tender a written resignation. She duly complied. The position of the Applicant is part of the bone of contention.

- [5] What remained undisputed though is that the Applicant indicated that he required time, in order to consider his options and to discuss the matter with his family, before making the decision. He finalized the closure of the Pietermaritzburg Branch, which eventually closed on 31 July 2013. During the period 9 May 2013 to 31 July 2013 the Applicant discussed the issue with his wife and did much research on issues such as housing, schooling, church congregations and various other issues such as crime and traffic in Nigel. Furthermore, several options were considered including acting as an agent for various enterprises in KwaZulu-Natal, the Respondent inclusive. On 15 July 2013 Mr De Bruin issued a letter addressed to Mr Jorrie Jordaan about the KwaZulu-Natal staff, in particular about Messrs Deon Pillay and the Applicant. The letter indicated the salaries that the two employees were to earn from the Respondent and that each was to be paid by the Respondent R100 000 net as a relocation allowance, the transfer costs of the new property and for furniture removal.
- [6] From August 2013 to December 2013 the Applicant was working for the Respondent at Nigel. He stayed at a Bed and Breakfast residence with Ms Bhagelu and Mr Pillay and on weekends he would visit his family in KwaZulu-Natal. The Respondent refurbished a plant which was to produce maize meal and was to serve new customers. The Applicant was tasked with having to find customers for it. There are “WhatsApp messages” which he frequently exchanged with Mr De Bruin in the

course of their duties penning the period 8 May to 15 November 2013. The Applicant received one message dated 20 August 2013 at 19h16 from Mr De Bruin which reads:

“Spoke to Allen, he says jorrie did not say anything to him regarding you – he just said he is waiting for an answer from you by Thurs. He says they were busy discussing his organogram when your name came up.”

- [7] Then on 15 November 2013 the Applicant sent out a message to Mr De Bruin who also responded to it on the same date and the exchange

between them reads:

“09:26, 15 Nov – Berry: Hi Gert, is everything on track for my retrenchment payout? Do you know if it gets paid out now or in December?”

13:51, 15 Nov – Gert De Bruin: Are you still at Nigel, If so is Jorrie there, then you maybe can ask him, else I will follow up on Monday.”

- [8] Further correspondence between the Applicant and Mr De Bruin was by means of the short message service, known as the “sms”.

The relevant portions were on 6 December 2013, which read:

“Hi Gert, Just wanted to check if you managed to speak to jorrie yesterday. I just wanted to confirm the retrenchment will be paid this month.

Hi Barry, pls send me your email address.

barmunro@gmail.com

Please tell me you are joking?

I wouldn't joke about something like this, I tried arguing for you, but to no avail, also spoke to Kobus & he also said they have the right to do it. Maybe you must speak to someone there.

That is so wrong.

I will get advice. I thought they would have a little more integrity then that.

Are you able to send me a copy of the exit interview?"

[9] After the Applicant supplied Mr De Bruin with his email address, Mr De Bruin issued to him a letter dated 6 December 2013, to which the Applicant responded by saying "Please tell me you are joking?" That letter was an attachment to a letter which reads:

"Hi Berry, attached please find a letter from the company.

I am very sorry that I am the bearer of bad news; but the company has decided that it will not be handled as a retrenchment, but as a resignation.

I am just going into the exec meeting & will be available from 13h00."

[10] The attached letter itself reads:

"At the end of July 2013 the PMB Branch where you were stationed closed down. Because of this you were offered a retrenchment package or the alternative to transfer to Pride Milling Nigel.

You indicated your acceptance of the position of Industrial Rep based in Nigel, thereby declining the retrenchment option.

You reported for duty in Nigel during the month of August and to management's knowledge, you were looking for a house to relocate.

During the month of August you indicated that you were no longer willing to relocate to Nigel due to personal reasons. You were then requested to give the company 3 months' notice (September, October and November) in order for the company to find a replacement for you.

Management did not receive any written resignation from you to date, therefore the company will be dealing with this situation as a resignation.

At the end of December 2013 any leave due as per company protocol will be paid out to you. The required pension forms will be forwarded to yourself for completion and to be submitted back for processing.

Kindly contact the writer should you require any additional information."

[11] By means of a letter dated 10 December 2013 the Applicant insisted that he had not resigned but was awaiting a due process for retrenchment which he said had not yet materialized. With a letter dated 13 December 2013, the Respondent said that the Applicant had accepted

a position in Nigel as an alternative to retrenchment which was evidenced by his commencement date in Nigel. It referred him to the benefits for a transfer as were outlined in the letter of 15 July 2013, referred to earlier. The Applicant then referred an unfair dismissal dispute for conciliation and thereafter for trial in this Court.

Evidence of the parties

- [12] At the heart of the dispute between the parties is the question whether the Applicant resigned as alleged by the Respondent or that he was retrenched as his version showed. Dismissal alleged by the applicant has therefore been placed in dispute by the Respondent. The Applicant had to prove the dismissal alleged. If successful, the Respondent had to prove the fairness thereof. If the Applicant's version is not probable, it will follow that he resigned and that would be the end of the matter.

Applicant's version

- [13] He said that at the meeting of 9 May 2013, he was given the choice to either be retrenched or to be transferred to Nigel. He indicated that he required time, in order to consider his options and to discuss the matter with his family, before making the decision. He thereafter proceeded to finalize the closure of the Pietermaritzburg office while he discussed the possible move with his wife. He did some research on Nigel as he considered a move to Gauteng but was loathe in doing so as it meant uprooting his family. He considered several options including acting as an agent for various enterprises in KwaZulu-Natal, the Respondent inclusive.
- [14] The Applicant said that he made up his mind by choosing retrenchment and he conveyed his election to the Respondent's employees on 23 August 2013. He averred that he was requested to assist the Respondent by working for a further three months until a replacement could be found for him. He said that he agreed on the proviso that, after the conclusion of the three month period, the termination of his employment would still be considered as a retrenchment. The Applicant denied that he resigned from the Respondent, effective 31 August 2013, and that he was required to work out a mandatory 3 months' notice period from 1 September 2013 to 30 November
2013. He said that according to the company written policy he was only required to serve a notice period of 30 days.
- [15] The Applicant said that it was not apparent from the meeting of 9 May 2013, that the election had to be made quickly and he denied that he would not have been given until August 2013 to make his election. The Applicant testified that no time period was ever limited for making his election. He referred to the electronic exchanges that took place between him and Mr De Bruin. He denied that there were electronic exchanges between him and his wife which suggested that he had elected to move to Nigel. The emails exchanged on 13 to 15 and 21 August 2013[2] suggest that the Applicant was still mulling on whether to accept the move to Nigel or to reject it and that he was in discussion over it with Mr De Bruin. On the issue of

100 business cards which were allegedly printed for the Applicant, the Applicant indicated that he had never seen the new business cards and had never made use of them.

- [16] Ms Bhagelu was his next witness. She worked as a stock controller. She was present at the meeting on 9 May 2013 when they were told that the Pietermaritzburg office was closing down. This did not come as a surprise. She had a suspicion. Sales had gone down after they lost Pick 'n Pay as a client. She said that they were told at the meeting that the branch would close down as it was not doing well. They were offered positions in Nigel. She was also told that other than the offer in Nigel they could stay back and take a package. She said that in the meeting they were not given a time period within which to respond and that they were not given an exact date when the branch would close down. She averred that there was never pressure placed on her after 9 May 2013 to make a decision. The branch closed at the end of July. She and the Applicant had to stay on to close the distribution centre in Pinetown. It was closed in August. She was called by Mr De Bruin and she went to Nigel for a week and worked there. She came back and thought about it and decided to move to Nigel. She called Mr De Bruin in August, on a Monday morning and told him about her decision
- [17] She said that she went to Nigel at the end of August 2013 with the Applicant as he would go on a Monday and return home on a Friday. She would return with either Mr Pillay or the Applicant. She and the Applicant often sat together during dinner and breakfast as they stayed in the same guest house, together with Messrs Pillay and Andries Swanepoel. While in Nigel she looked for homes, called agents, looked on the internet and got assistance from the Applicant. She went to look at homes. She physically looked at houses in Nigel during her lunch break and after work. She confirmed that Mr Pillay asked to come up and look at schools and property in July 2013. She disputed that the Applicant also asked for leave to look at schools and property. She confirmed, however, that his car did break down. She did not know why he did not come up to Nigel in July. She worked in September. After the long weekend she came home. The Applicant and Mr Pillay were off and so she flew up.
- [18] She testified that the Applicant often told her that there was no way he could live in Nigel. She travelled with him for plus minus 500 kilometres home and they definitely always discussed it. He told her that he could never bring his family to that area and change his lifestyle. To her knowledge the Applicant never mentioned telling the company that he was going to transfer. In relation to the Applicant staying on for three months, she said that she gathered from the Applicant that he wanted to help with sales for the yellow maize. She said that, unlike her, the Applicant never looked for a house to buy.

She was certain that the Applicant said he was not going to settle in Nigel as he was going to take his package and stay in Pietermaritzburg. He said he could not live the Nigel lifestyle. He even wondered how Mr Pillay was able to settle down in Nigel.

[19] On one weekend while at home her mother asked her if she did not think there was work in Pietermaritzburg. She thought about it, called Mr De Bruin and told him she was sick. On the next day she told him that she could not come up to Nigel anymore. She unsuccessfully sought to be retrenched and therefore resigned. She was told that she needed to give a letter of resignation to get her provident fund money. She emailed it to the human resources personnel in Nigel.

Respondent's evidence.

[20] The Respondent called and led the evidence of two witnesses. The first was Mr Deon Pillay, an employee of the Respondent, who worked with the Applicant in Pietermaritzburg. In his evidence Mr Pillay confirmed that at the meeting on 9 May 2013 Mr Jordaan had indicated the intention to close down the branch in Pietermaritzburg. He said that employees were given a timeframe of one week within which to respond. They were told of the intention to close down the branch by the end of July 2013 and that this had always been the date of its intended closure. He was not able to respond in one week and he asked Mr De Bruin for an extension, saying it was not an easy decision. He ultimately spoke to Mr De Bruin on 29 May 2013 in a face-to-face meeting where he told him that he was prepared to relocate. He started in July 2013 in Nigel.

[21] He said that he was given an opportunity to look at Nigel but decided not to live there as it did not have good living conditions. He looked at property in Springs and his family was granted the opportunity to come up. It was a huge upheaval to move house but it was not confirmed in writing. He did not receive an amended contract of employment. He did receive a document, which he requested at the beginning of September 2013, so that he could apply for a bond. He said that the Applicant did not come up to Nigel in July 2013 because he had problems with his car but was given the opportunity to come up. He found out in mid-August that the Applicant did not elect to come up. Mr Pillay testified that he assumed that the Applicant had elected to be transferred. He said that the Applicant had worked out the months of September, October and November due to the fact that the company also thought that The Applicant was moving to Nigel. That put the company in a predicament and so to assist the company, he worked the three months, but it was not to work out any mandatory notice period.

[22] The next witness for the Respondent was Mr De Bruin. He had previously been stationed in Pietermaritzburg, but had moved in January 2013. He had approached Mr Jordaan, the Managing Director of the Respondent, in October 2012 and told him that the volumes in Pietermaritzburg were declining. He said it was funny that Mr Jordaan was going to approach him at the same time asking him if he was willing to move up to Gauteng to head up sales. It would result in him moving onto the Nigel payroll which would reduce the cost to Pietermaritzburg so that they could bring up the sales in Pietermaritzburg.

[23] On 9 May 2013, he came to Pietermaritzburg with Mr Jordaan to have a meeting with the staff. Mr Jordaan said to employees that, due to the decreasing volumes, the company was considering closing the branch and moving all the staff to Nigel. The company did not want to lose any of them. They were given an election. He confirmed that the company was entitled to close a branch that was not productive. An offer was made to employees of R100 000 as a settle in allowance, payment of furniture removal and the transfer and bond costs for new property purchased. Mr De Bruin indicated that the Pietermaritzburg employees, at the meeting were given a period of one week in which to make their election between retrenchment and a transfer. He said that it was initially indicated that the Pietermaritzburg branch would close at the end of June 2013. It only closed at the end of July 2013 as there was a three months' notice period for a lease agreement in operation with a landlord. Mr Pillay, Ms Bhakelu and the Applicant went back to him reporting that they had discussed it with their families but the period that they

were given to provide an answer was too short. They sought and were granted an extension of another week.

[24] Mr De Bruin said that the Applicant communicated his decision to him early in the morning in Pietermaritzburg on 29 May 2013, while he raised concerns regarding moving and uprooting his family. They discussed salary. The Applicant said that he and his wife, Bridgette, decided that they would give it a go. To him that was an acceptance of the alternative of a transfer to Nigel. He said that Ms Bhakelu indicated that she wanted to consult with her mother. Even though she had reservations, she also accepted to move. The Applicant asked for his home telephone number, which he gave to him and he asked if his wife, Bridgette, could speak to Mr De Bruin's wife. The wives spoke for a short while. That was on 16 May 2013. The Applicant stayed in Pietermaritzburg to inform suppliers of notices and to wrap up distribution and stocktake. Mr Pillay indicated that he was definitely moving up. He commuted on a weekly basis between Nigel and Pietermaritzburg. Both Mr Pillay and the Applicant asked if their kids and family could move at the end of the year because of schooling. Mr Jordaan said that was fine, and they could commute at the cost to the company prior to that.

[25] Mr Pillay indicated that he was definitely moving up. He commuted on a weekly basis between Nigel and Pietermaritzburg. Mr Pillay had asked him if the company would pay for his family to come up and it was eventually agreed that the company would pay. Similar arrangements were made with the Applicant who then filled in his leave form, but his vehicle gave him gear box troubles. The Applicant did not cancel his leave but he cancelled going up to Gauteng. He said that it was on 6 August 2013 that the Applicant told him that they were reconsidering the move because of the children and the drugs in Gauteng. Mr De Bruin told him that he would like him to reconsider. There would be difficulty in finding a job. The Applicant then came back to him on 13 August 2013 and said he decided not to move. According to the Applicant, it was a final decision. Mr

De Bruin telephoned Mr Jordaan on 15 August 2013 to report the decision. Mr Jordaan said that the Applicant was being silly in not accepting and asked him to ask the Applicant to reconsider. The Applicant's position never changed and on 23 August 2013 he finally decided not to move.

[26] He said that Mr Jordaan instructed him to tell the Applicant that he must give the company three months' notice to find a replacement for the Applicant because once the Applicant had accepted the transfer on 29 May 2013, the company had stopped recruiting. The Applicant agreed to this and they spoke about his package. The Applicant asked if the company would still pay the package even if he changed his mind and Mr De Bruin said that it was not his decision but that he was sure that they would. He said he then spoke to Mr Jordaan who told him that he did not have the mandate to suggest that to the Applicant and that the MD's decision was final. The decision was placed in a letter and sent to the Applicant. In respect of the intermediary role he played between the Applicant and Mr Jordaan, including the 'sms' exchanges, Mr De Bruin said that he was merely attempting to assist the Applicant in getting his retrenchment package even though he was aware that the Applicant had given his resignation to him personally.

[27] Mr De Bruin conceded that all employees who resign were required to hand in a written notice of resignation, hence his insistence that Ms Bhagelu was to hand in such a notice. He also said that the company printed some 100 business cards for the Applicant containing the Nigel information, during July 2013, upon the expectation of his transfer to Nigel. According to Mr De Bruin the cards would be required as the Applicant had elected to be transferred on 29 May

2013. He said that the company would never have gone to such an expense if it was not certain that the Applicant was transferring to Nigel. 100 business cards at a price of R 1, 20 per business card are said to have been printed for the Applicant. Mr De Bruin indicated that he had personally seen the Applicant give a Nigel business card at a meeting with another company and had seen him slide the business card across the table.

[28] Mr De Bruin testified about the transfer of payroll, saying that the Applicant had to be paid from Nigel as a result of him accepting a transfer to work there. He conceded though that after the Pietermaritzburg office had closed down, it was not possible to pay the Applicant from that closed office while he rendered further services. Mr De Bruin referred to a letter of 15 July 2013 which he issued and addressed to Mr Jordaan regarding packages he said were offered to and accepted both by the Applicant and Mr Pillay for the acceptance of their transfers to Nigel. He was questioned about this offer against the Applicant having on 29 May 2013 made any election or any agreement to transfer and he said that Mr Pillay had asked for the letter to secure a loan. As regards the relocation allowance, he then said that the allowance was not paid because the Applicant

changed his mind. It was only to be paid one month before relocation.

- [29] He testified that Mr Jordaan told him that if the Applicant had accepted retrenchment at the end of May 2013 he would have been paid his three and a half months' package. At that stage, in November 2013, the company had already paid him six months' salary and therefore there was no way the company would still pay him a package. He understood the response from the Applicant, saying that this was so wrong, to be a reference to his years of service for which he thought he would be paid a retrenchment package. The exit interview form was completed and the reason of resignation was ticked on the UIF19 form because the Applicant had resigned.
- [30] In his closing submissions Mr J P Pretorius, appearing for the Applicant, inter alia, said that the Respondent and its employees, fabricated their version in an attempt to escape payment of a retrenchment package to the Applicant. He submitted that it was patently clear from all the documentary evidence that the issue of resignation only arose during December 2013, after the Applicant had ceased his employment with the Respondent. Not once, ever, so he argued, was the issue raised prior to December 2013 and that it was clear that Mr De Bruin and Mr Jordaan were opportunistic in that regard. He averred that Mr De Bruin's evidence was extremely improbable and unconvincing, to say the least. He submitted that there was little doubt that the Applicant's version should be accepted as being the more probable and, accordingly, it must be accepted that the Applicant was retrenched.
- [31] Ms L Pillay appearing for the Respondent submitted in her closing remarks, inter alia, that the true nature of the Applicant's case was that things were not put in writing and therefore the Court had to make a finding against the Respondent. This was not the test to determine the probabilities, the submission went. All the evidence must be considered. It was submitted that the probabilities were that the applicant did agree to a transfer and then changed his mind with the effect that he resigned. Even if it were accepted that there was no resignation, the Applicant's own version was an acceptance that there was substantive fairness in the retrenchment process. Despite the omission to provide a section 189 (3) letter, the purpose of the Act has been met. She said that there should be no finding against the Respondent on this aspect. The submission was that the Applicant did not lead any evidence that he was not paid his leave pay and that therefore this claim must fail together with the main claim which should be dismissed.

Evaluation

- [32] The Respondent has placed the dismissal of the Applicant in issue. In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal[3] and so the Applicant was faced with that challenge from the commencement of trial. Proof had to be on a balance of probabilities.

It remained common cause in this matter that when the Respondent announced the closure of its Pietermaritzburg branch it said that its entire staff would be accommodated at its Nigel offices. Those who could not transfer were left with the option of being retrenched. One employee immediately opted for retrenchment while the other three needed some time to consult with

their families and to make up their minds. Whether the Respondent gave its employees time frames within which to respond, has become an essential issue in this matter. The minutes of the meeting held on 9 May 2013 provide no assistance in this respect.

[33] According to the Respondent 29 May 2013 was the ultimate date on which an election had to be made. The Applicant disputed this evidence. Logic dictates that there had to be a definitive date on which an election had to be made so that the company would consider whether to replace those who opted for retrenchment or re-arrange its affairs with the existing staff. The case of Mr Pillay and Ms Bhakelu conformed to this definitive approach as it was clear by 31 July 2013 that they would move to Nigel. The letter of 15 July 2013 issued by Mr De Bruin outlining the financial implications of a transfer for Mr Pillay and the Applicant support this definitive approach. This letter was, by the way requested by Mr Pillay and was not a

re-negotiation of the terms as suggested by Mr Pretorius.

[34] The email exchanges between the Applicant and his wife on 29 May 2013, the very date on which the Respondent said it wanted a final response, support the view that the Applicant had made up his mind that his family had to move. They then discuss the implications of the move and the investigative exercise they would have to embark upon. The exchange ends with the wife pondering on what was in store for them. These thoughts are a clear manifestation that the Applicant had decided to move to Nigel and his wife agreed to it. There are no noteworthy developments that took place in June 2013. In July 2013 the Applicant took leave to go to Nigel and to conduct a study of the area as their new destination in life. Part of the research conducted

included a telephone call made between the wife of the Applicant and Mr De Bruin's wife, which the Applicant was very reluctant to concede to. None of these exchanges suggest that the decision to relocate was to depend on the outcome of the investigative exercise. It is quite probable that this study was meant for a move that would take place in six months later, as proposed in their exchanges. The Applicant had motor vehicle problems and could not travel as planned.

[35] The exchange of 31 July 2013 at 21:24 reveals what was going on in the mind of the Applicant at this time. He was reconsidering the relocation to Nigel. He spoke of hatred of being away from home, saying he did not think he could manage six months of it. He wondered how others afforded working away from home. The only six months thus far spoken of related to relocation, if the Respondent would allow them to delay it with six months. At 17:17 of the same date his wife even suggested that the Applicant was to consider leaving the Respondent's employment. Then at 18:00 he counters that suggestion by a consideration of other alternatives. The exchange of 13 August 2013 at 08:48 reveals that the Applicant had by then spoken

to Mr De Bruin and told him he no longer wanted to move but was told to reconsider. By this time the Applicant and his wife were in agreement that Johannesburg was not right for them. The Applicant would have Court believe that it was only at about this time, in August 2013, that he responded to an issue that was raised as far back as 9 May 2013, some three months ago. That version does not accord with probabilities of this matter.

[36] The issue of a business card being passed by the Applicant to a client while working in Nigel raised the debate whether it was a card with a hand written amendment or a new card issued to him. However, it is not necessary to resolve the issue. A card that could have been newly issued to the Applicant was produced in Court. The Applicant faced a mammoth task to dispute that new business cards were issued him. It was never suggested that the card produced in Court was merely manufactured to help fabricate the case of the Respondent during the trial. Neither do I have the basis for upholding that view. The probabilities of this matter favour the acceptance of the version that the Respondent did produce business cards for the Applicant. Whether such production was because of a belief that the Applicant had relocated to Nigel or that an employee of the Respondent erroneously issued the cards, is not easy to resolve in the absence of the evidence of that particular employee who issued it. This issue therefore remains a moot point.

[37] As a witness the Applicant was far from being a satisfactory witness. When called to give an account of events of 29 May 2013, he had amnesia and yet claimed to recall preceding events with no clear explanation why he recalled older events better than recent ones. If according to him nothing was said of significant on 29 May 2013, he should have had a clear memory. Yet from the exchanges he had with his wife on that day, it is clear that he should have remembered the date and its developments. This observation is made notwithstanding the failure of the Respondent to properly traverse events of that day

in its plea. The Applicant did not carry the conviction of his version as a witness. In my assessment, Ms Bhakelu's evidence

did not really add much weight to the evidence of the Applicant. When properly seen it relates to the moment when the Applicant

re-considered the move. She even disputed a common cause issue that the Applicant also asked for leave and wanted to look at schools and property in Nigel.

[38] As a witness Mr De Bruin came across as much better than the Applicant. The evidence of Mr Pillay did not have as much a desired effect as might have been intended. He expressed the attitude of the Applicant about the relocation without substantiation.

[39] Finally on probabilities, as the Applicant re-considered the move, he also wanted to be paid the retrenchment package and he enquired about it from Mr De Bruin. The Applicant said that he agreed to the three months' notice period only on condition that the retrenchment package stayed in place. The probabilities are that an employee could not place such a condition if it was common cause between them that he was retrenched and would receive a

package. This version had to have been created to support his claim that there was agreement that he would be retrenched.

[40] From the above, I conclude that:

Ø The respondent did put some time frame within which the employees in Pietermaritzburg had to make an election on whether to relocate to Nigel or be retrenched;

Ø The Applicant made his decision and communicated it to the Respondent by 31 May 2013;

Ø The Applicant chose to relocate and thereafter embarked on an investigative exercise to inform himself of the prevailing circumstances in Nigel;

Ø The Applicant found the living conditions in Nigel to be unfavourable. He re-considered the matter, decided not to relocate and communicated his decision to Mr De Bruin, asking that the retrenchment package be paid out to him;

Ø The respondent declined to pay him the retrenchment package;

Ø The Applicant terminated his employment with the Respondent;

Ø The termination of employment by the Applicant was not due to the operational requirements of the Respondent. Applicant resigned.

[39] Accordingly, the following order shall issue, taking into consideration the law and fairness of the prevailing circumstances:

1. The claim of the Applicant is dismissed;
2. No costs order is made.

Judge of the Labour Court of South Africa.

APPEARANCES:

1. For the Applicant: Mr J P Pretorius.

Instructed by: Redfern and Findlay Attorneys, Pietermaritzburg.

2. For the Respondent: Ms L Pillay.

Instructed by: Yusuf Nagdee Attorneys, Braamfontein.

[1] Act Number 66 of 1995, hereafter referred to as the Act.

[2] See pages 32, 35, and 37 of the index to the WhatsApp correspondence.

[3] See section 192 (1) of the Act.

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Prepared on 10 October 2026 · Esheria