

SOUTH AFRICA / JUDGMENT

NEHAWU obo Magobiyana v Sirkhot and Others (JR677/16) [2018] ZALCJHB 97 (7 March 2018) [2018] ZALCJHB 97

COURT

Labour Court Johannesburg

BEFORE

Lekale

CASE / FILE NUMBER

JR677/16

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Not

of interest to other judges

Case

no: JR 677/16

In

the matter between:

NEHAWU
obo ESME
MAGOBIYANA Applicant
And
IMTHIAZ
SIRKHOT
N.O. First
Respondent
METAL
& ENGINEERING
INDUSTRIES Second
Respondent
BARGAINING
COUNCIL
SCAW
METALS Third
Respondent

Heard:

08 February 2018

Delivered:	07 March 2018
Summary:	Labour Relations Act, 66 of 1995: Review in terms of section 145 – Union member not pursuing available alternative positions entailing salary reduction – Retrenchment unavoidable in circumstances – Union furnished with information requested for consultation purposes – Selection criteria not before arbitrator for determination – Even if selection criteria raised for determination same fair and objective – Dismissal fair – Application dismissed.

JUDGMENT

LEKALE, AJ

BACKGROUND

AND INTRODUCTION

[1] On 31 July 2015 the applicant's member, who was employed by the third respondent as Executive Personal Assistant ("Executive

PA") to the Human Resources Executive, was dismissed on the basis of the third respondent's operational requirements. She felt aggrieved by the dismissal and enlisted the assistance of the applicant to refer a dispute concerning alleged unfair dismissal to the second respondent for resolution.

[2] The dispute remained unresolved after an attempt at conciliation and, eventually, served before the first respondent, in his capacity as arbitrating panellist with the second respondent, for arbitration. The first respondent eventually issued an award declaring the dismissal both substantively and procedurally fair on 23 February 2016.

[3] The applicant took issue with the award and now approaches this court in terms of section 145 of the Labour Relations Act 66 of 1995 ("the LRA") for an order setting the same aside and substituting it with an order for reinstatement of its member on the grounds that the dismissal was unfair.

[4] The application is opposed by the third respondent on the grounds that the impugned award is not reviewable.

ISSUE FOR DETERMINATION

- [5] The parties are in dispute over whether or not the impugned award could reasonably not be made on the material properly before the first respondent with specific reference to the information furnished to the applicant by the third respondent for consultation purposes as well as the avoidability of retrenchment in the light of available alternative employment opportunities.
- [6] In the event of the preceding question being decided in the positive, I am enjoined to set the award aside and to substitute the same with an order of reinstatement in favour of the applicant's member.

DEPOSITIONS AND CONTENTIONS FOR AND ON BEHALF OF THE APPLICANT

- [7] The applicant's legal officer, Malose Phoko ("Mr Phoko") deposes and submits, inter alia, to the effect that the applicant's member was initially employed as Executive PA to the respondent's chairperson in February 2014 but was later in June 2014 transferred to serve as Executive PA to the Human Resources Manager where she remained until her unfair dismissal on 31 July 2015. A series of consultation meetings took place both before and after she joined a trade union. After joining the union she got represented and assisted during such consultations by shop stewards when a wide range of issues were covered inclusive of alternative employment positions. Consensus could not be reached and the matter was eventually referred to the bargaining council having jurisdiction for resolution. During the arbitration hearing which ensued applicant's member indicated that she was not aware of the financial worth of available alternative positions although she was aware of their grades. It was, further, her evidence that she did not mind taking a pay cut by pursuing such positions.
- [8] According to Mr Phoko the first respondent misapplied his mind to the facts before him insofar as he failed to appreciate that it was essential for the applicant's member to know the actual monetary value of such alternative positions and not their grades in order to make a decision on whether or not she could live with a reduced salary. The first respondent, further, committed a gross irregularity in accepting the third respondent's version on whether or not the applicant's member decided not to pursue the relevant positions because of her lifestyle without first making a credibility finding as to which of the two conflicting versions before him was reliable and acceptable as required by law. The award is, in his view, riddled by gross irregularities and is not supported by available evidence to the extent that no reasonable decision-maker could make it. The third respondent, in fact, considered only one selection criterion viz. Last In First Out ("LIFO") but the first respondent found that skills preservation was also applied as a criterion.

DEPOSITONS AND CONTENTIONS FOR AND ON BEHALF OF THE THIRD RESPONDENT

- [9] The third respondent's Group Employee Relations Manager, Mandisile Thamsanqa, deposes, inter alia, to the effect that at the time of the consultations and the retrenchment of the applicant's member there was no vacant position of an Executive PA. The evidence before the first respondent was clearly to the effect that the applicant's member discussed the pay cut associated with the alternative position of Office Administrator/Supervisor but did not avail herself by applying for

the same. She was provided with all the information she requested for the job in question.

- [10] In argument on papers and before the court Mr Itayi Gwaunza ("Mr Gwaunza") for the third respondent submits, inter alia, to the effect that the first respondent was alive to the two conflicting versions before him as well as the need to resolve same. It is clear from the award that the first respondent resolved the conflict by having regard, inter alia, to the probabilities finding that the applicant's member effectively rejected the alternative positions offered because she was not willing to take a pay cut. In his view dismissal was unavoidable where available alternative positions did not appeal to the applicant's member. The applicant party was furnished with all the information it required to participate meaningfully in the consultations. The first respondent had regard to all the information properly before him inclusive of the minutes of various consultation meetings the parties had. In his view the award cannot be faulted on any grounds because the applicant's member focused her case on whether or not there were alternatives to avoid retrenchment. The fairness of the selection criteria applied in the dismissal was never placed before the first respondent for determination.

APPLICABLE LEGAL POSITION

- [11] The test in the instant matter is whether or not the impugned award was the kind that could reasonably not be made on the material properly before the first respondent as the arbitrator.[1]
- [12] The technique applied by the courts for resolution of factual disputes requires a balanced assessment of the reliability, credibility and probabilities associated with the evidence of the respective witnesses with the probabilities prevailing in the event of credibility findings and probabilities being equipoised.[2]
- [13] The approach entails a holistic approach to the evidence properly before the court and weighing up the merits and demerits of each of the conflicting versions regard being had to probabilities.[3]
- [14] Assessment of evidence on the basis of credibility alone without regard for underlying probabilities constitutes a misdirection.[4]

APPLICATION OF LEGAL POSITION TO THE FACTS & FINDINGS

- [15] It is true, as submitted for the third respondent, that the parties limited the issues for determination by the first respondent to whether or not the applicant was properly consulted and whether or not there existed a fair reason for the retrenchment.
- [16] Even if the fairness of the selection criteria was properly raised for determination before the first respondent, I am satisfied that same was fair and objective insofar as the applicant's comparator was indisputably more experienced regard being had to her extensive service with the third respondent.
- [17] It is, further, correct that in her challenge against the substantive fairness of the dismissal the applicant's member focussed her attention before the arbitrator on whether or not retrenchment was unavoidable regard being had to availability of alternative employment opportunities and not on the fairness of the selection criteria employed.
- [18] A perusal of the impugned award reveals that on the fairness procedure followed to effect the dismissal the first respondent

effectively found that several consultation meetings were held by and between the parties first with the applicant's member alone and later with her union representatives during which the reasons for retrenchment were outlined and discussed. The first respondent, further, observed from minutes of various consultation meetings that when the applicant's member was offered alternative employment opportunities it was pointed out on several occasions by the third respondent that such positions entailed pay cuts. The arbitrator, further, found that the applicant's member "was afforded a fair opportunity to pursue alternative vacant positions but chose not to do so because it would require that she takes a pay cut". It was, furthermore, the first respondent's view that "a reading of the minutes of the several consultation meetings confirmed that the applicant's member never offered to accept any position that would result in a salary cut".

- [19] The applicant contends that in concluding that its member elected not to pursue alternative vacant positions "because it would require that she takes a pay cut" the first respondent accepted the third respondent's version, which was in direct conflict with that of its member, without making a credibility finding as required by law. In the applicant's view its member's case was clearly that she was prepared to accept a reduced salary all for the sake of avoiding retrenchment.
- [20] A reading of the record clearly confirms the first respondent's finding that the applicant's member never offered to accept any of the positions concerned which could have resulted in a salary cut on her part.
- [21] The evidence properly before the arbitrator from the third respondent's main witness, to whom the applicant's member

directly reported at the time of the dismissal, was not to the effect that the applicant's member stated that she would not accept the relevant positions because of her lifestyle which did not suit a reduced salary. His evidence was firstly to the effect that the third respondent's position during

consultations was that a position involving reduced salary was not suitable but that two positions were selectively offered to her because they were considered to be closer to her pay grade. One of three positions available was unfortunately not suitable because the applicant's member did not qualify as she was not an artisan as required for the relevant position. Secondly he testified that the applicant's member came back after considering the information they gave her in respect of the alternative job in Cape Town to say that "the grade or level of the position would not be suitable to the pay scale at which she was". He further testified that "she considered [that position] as well but I think if I remember well it was a question of a grade that she did not pursue it fully".

[22] In my view that the applicant's member did not accept the vacant position in question because she was not interested in taking a pay-cut as it would not suit her lifestyle was, in fact, a conclusion reached on the balance of probabilities by the first respondent on the evidence before him regard being had to his statement to the effect that if he could not find it in the minutes that the applicant's member stated that she wanted any of the relevant positions he was "going to take it for granted to that the position was offered to her and she chose not to take it in terms of the minutes".[5]

[23] Even if I am wrong in the preceding finding I am satisfied that such a conclusion was reached by the relevant witness for the third respondent on probabilities insofar as, on his evidence, the positions, in fact, entailed a pay- cut on the part of the applicant's member who stated that one such position was not on the same grade or level as her pay scale.

[24] The issue for determination by the first respondent was, as such, whether or not on available evidence alternative positions were offered but not accepted by the applicant's member. The applicant's member effectively disputed at arbitration level that the Cape Town position was offered to her insofar as she contended that the salary attaching thereto was not disclosed to her in order for her to consider it properly for the purposes of making a decision thereon.

[25] The arbitrator was, thus, not confronted with two mutually destructive versions as to whether the applicant's member

stated that she could not entertain alternative positions because she was not interested in taking a pay-cut as that would not suit her lifestyle. It was simply not the third respondent's case before the arbitrator that the applicant's member made such a statement. The relevant statement was, in my view, the third respondent's opinion on why the applicant's member did not pursue the positions. The first respondent, therefore, did not have to make any credibility findings on the issue in question and correctly considered the probabilities as to whether or not the positions were offered but were not pursued by the applicant's member.

[26] Even if I am wrong in this regard I am satisfied from case law that the first respondent followed the applicable technique correctly and resolved the conflicting on probabilities regard being had to the totality of evidence before him.

- [27] The question before the arbitrator was simply whether or not offers of alternative employment were made, and if so whether or not they were not accepted or pursued by the applicant's member.
- [28] It is clear from the material before the first respondent that the applicant's member, as assisted by shop stewards, requested and received information regarding the relevant positions from the third respondent. It is not the applicant's case that information relative to applicable salaries was requested but was withheld by the third respondent. In my view if the applicant's member required specific information about the monetary value of the relevant Cape Town position she would simply have requested the same.
- [29] I am, thus, persuaded by the material properly before the first respondent that the issues that needed to be consulted on were clear to the parties and where additional information was required it was requested and furnished.
- [30] In the result I am not satisfied that the impugned award is one which could reasonably not be made on the material which served before the first respondent.
- [31] As far as costs are concerned I am satisfied that the requirements of law and fairness cry out for the same to follow the result insofar as the parties asked for the relevant order against each other.

ORDER

- [32] In consequence the application is dismissed with costs.

LJ Lekale

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: M Phoko (Union Official)

Instructed by:

NEHAWU

For the Respondent: I Gwaunza (Edward Nathan Sonnenbergs Inc)

[1]

See *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others*

[2007] 12 BLLR 1097 (CC) and *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA & Others* [2014] 1 BLLR 20 (LAC).

[1]

See *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others*

[2007] 12 BLLR 1097

(CC) and Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA & Others [2014] 1 BLLR 20 (LAC).

[2] See *Stellenbosch Farmers Winery Group Ltd v Martell et Cie & Others* [2003] 1 SA 11 (SCA).

[3] See *S v Guess* 1976 (4) SA 715 (A).

[4] See *Medscheme Holdings (Pty) Ltd v Bhamjee* [2005] 5 SA 339 (SCA) at 345A and *Solidarity obo Van Zyl v KPMG Services (Pty) Ltd & Others* (2014) 35 ILJ 1656 (LC).

[4] See *Medscheme Holdings (Pty) Ltd v Bhamjee* [2005] 5 SA 339 (SCA) at 345A and *Solidarity obo Van Zyl v KPMG Services (Pty) Ltd & Others* (2014) 35 ILJ 1656 (LC).

[5] See pages 101 lines 19 to 22 and 102 line 1 of Transcriptions Bundle.

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