
SOUTH AFRICA / JUDGMENT

Ntshabele v Blue Turtle Technologies (Pty) Ltd (JS1020/2013) [2014] ZALCJHB 391 (13 October 2014) [2014] ZALCJHB 391

COURT

Labour Court Johannesburg

BEFORE

Mooki

CASE / FILE NUMBER

JS1020/2013

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case No: JS 1020/2013

In the matter between:

MOTLOGELWA MORGAN NTSHABELE

Applicant

and

BLUE TURTLE TECHNOLOGIES (PTY) LTD

Respondent

Heard: 29 - 30 July 2014

Delivered: 13 October 2014

Summary: Retrenchment – no case made in challenging the retrenchment

MOOKI AJ

[1] The applicant was given a section 189 notice on 19 June 2013. His employment was terminated on 24 June

2013. He challenged the termination on the ground that his retrenchment was unwarranted because an alternative position was available at Standard Bank.
- [2] The following considerations were placed in dispute regarding procedural aspects to his dismissal:
- 2.1 Whether the consultation process was a superficial act of going through the motions; and
- 2.2 Whether the decision to terminate his services was reached prior to the consultation process.
- [3] Mr Van den Bosch and Ms Nadia van der Westhuizen gave evidence on behalf of the respondent. They are, respectively, the respondent's managing director and human resources manager.
- [4] Mr Van den Bosch gave the following evidence. The respondent employed the applicant on 12 April 2012 as a business analyst. The respondent's core business is to provide enterprise system management software and related professional services. The business is divided into nine units, each run by a different manager. The business units differ. For example, margins in the consulting business unit are smaller than those in the business unit dealing with software sales.
- [5] He explained how the respondent rendered services. Employees in the consulting business attend at the premises of clients of the respondent, where they are based and do work. The respondent then invoices its clients on the basis of work done by its employees. Such employees are described as "billable".
- [6] The applicant was placed at Vodacom on two separate occasions. Vodacom requested, on both occasions, that the applicant be removed from its premises. The applicant was then placed at the Johannesburg Property Company. This company also subsequently requested that the applicant be removed from its premises.
- [7] The applicant became non-billable after he was removed from Vodacom. He was non-billable as at October
2012. He was placed at the Johannesburg Property Company but on a non-billable basis. It was hoped that he would eventually render billable work to this company. This did not happen.
- [8] The applicant requested a meeting with him following a meeting among the applicant, Ms van der Westhuizen and a former employee, Hein, which took place on 6 March
2014. He met the applicant on 8 March 2013. It was decided following this meeting, that Hein and the sales team would look for opportunities for the applicant. The market was depressed at the time. Peter Bowden, who was responsible for the respondent's support division, arranged that the applicant be interviewed at Standard Bank. David Lanagan of Standard Bank wanted consultants. Standard Bank was not interested in the applicant.

- [9] Various vacancies were published by email and distributed internally within the respondent. Advertisements were also placed on the respondent's website. The applicant did not show any interest.
- [10] The respondent's business was performing poorly. He gave evidence on the income statement for each business unit of the respondent. There was a loss of approximately R1.4 million at the time. Salaries made up the biggest cost item. Salary payments exceeded income. The business was not profitable. The applicant was the only employee who did not bring revenue for eight months, even though the applicant continued to receive his salary throughout.
- [11] The applicant mentioned that there was an opportunity at Standard Bank. The respondent could not pursue the opportunity because the applicant did not provide information about the details of that opportunity; including information on the contact person at Standard Bank in respect of the opportunity.
- [12] He denied that the respondent did not follow up on the opportunity at Standard Bank as identified by the applicant. He indicated that it would be illogical for the respondent not to place the applicant at the opportunity.
- [13] There were a number of meetings with the applicant. These were on-going talks in which the respondent tried to find something for the applicant to do. The respondent did not recover costs associated with the applicant in eight months.
- [14] The respondent subsequently formalised the consultation with the applicant. A consultation with the applicant took place on 24 June 2013. The applicant had a vague and aggressive attitude, refusing to answer questions during the meeting. The applicant was not constructive and showed no interest in making contributions. He refused to discuss the opportunity at Standard Bank. The meeting subsequently deteriorated.
- [15] The respondent gave the applicant a retrenchment notice and paid him for the month of July. The applicant was free to leave on 24 June 2013. The applicant took up employment with Standard Bank after his retrenchment. Standard Bank paid the applicant more compared with the respondent.
- [16] The applicant never disclosed that he had found work at Standard Bank and that he was going to work for Standard Bank. The applicant went through the motions during the discussion on 24 June 2013 because the applicant knew that he had a job at Standard Bank. The applicant was interested only in getting a retrenchment package from the respondent.
- [17] Mr van den Bosch gave the following evidence under cross-examination. He does not know about discussions between the applicant and Mr Hain on 6 March 2013 that the respondent will not be using a program called PIMS, or that Hain told the applicant during that meeting that the applicant was to be retrenched. He denied that the respondent raised the issue of retrenchment during the meeting on 8 March 2013. It was the applicant who raised the issue.

- [18] He repeated his evidence concerning attempts by the respondent to find opportunities for the applicant. The applicant excluded himself from available positions, most of which were technical in nature. The respondent tried for eight months to find something for the applicant, including at Standard Bank from which the respondent received 20% of its business. He expected the applicant to find opportunities and to come up with ideas. The applicant was not forthcoming in this regard.
- [19] He repeated his evidence that the applicant never gave details of the opportunity that the applicant said he had identified at Standard Bank. There was a period when the applicant could not be located. Nadia asked the applicant to advice regarding the Standard Bank opportunity but she could not locate the applicant. Nadia then wrote an email to the applicant. The applicant did not reply to the email.
- [20] The applicant joined Standard Bank most probably because the applicant was paid 25% more than what he got from the respondent. That would be a reason for the applicant leaving a permanent position for a non-permanent position.
- [21] He denied that the applicant was never given opportunities to apply for alternative positions, including positions that were advertised. The applicant was not qualified for the positions. Positions were going to be raised with the applicant during the consultation. This did not happen because of the applicant's "bad body language and bad everything" during the consultation.
- [22] He denied that the Standard Bank issue was never discussed. The issue was key to the meeting. The applicant was forgetful or lying. He denied that the respondent did not tell the applicant about opportunities being explored by the respondent on behalf of the applicant. The applicant was involved in discussions regarding such opportunities; including opportunities in Nigeria and at Liberty.
- [23] He agreed that the consultation process was short. That was because the applicant saw no benefit remaining with the respondent. It was better for the applicant to get a package from the respondent and then leave.
- [24] He denied that the applicant could have been surprised when he received the retrenchment notice, pointing out to a prior email by Nadia that the applicant was not finding work. The respondent did not jump at the opportunity to issue the section 189 notice.
- [25] The respondent did not suddenly change to a formal retrenchment process when the applicant requested a meeting regarding alternative employment. The respondent started a formal process that was not a retrenchment. He denied that the respondent failed to explore alternative opportunities but went into the retrenchment process by issuing a section 189 letter on 19 June followed by the retrenchment of the applicant on 24 June. The respondent had not found opportunities for the applicant in months. The applicant was keen to leave. He wanted a package because he already had a job.

- [26] He gave evidence that the respondent lost money because the applicant was sitting at the office. He denied that the retrenchment process was unfair.
- [27] The following evidence of Mr Van en Bosch was not disputed during his cross-examination: the demeanour of the applicant during the meeting on 24 June 2013, that the applicant wanted the package because he already had a job, that the applicant earned 25% more than he did with the respondent, that the respondent suffered financial loss and that the applicant was the only consultant who did not bring revenue, that the applicant was non-billable in a period of some eight months, that the applicant was keen to leave; and that the applicant only wanted a package from the respondent.
- [28] No version was put to Mr Van den Bosch regarding proposals and suggestions by the applicant as alternatives to retrenchment. Similarly, no version was put to Mr Van den Bosch that the applicant preferred to remain in the employ of the respondent, as opposed to some other company.

Evidence by Ms Nadia Van der Westhuizen

- [29] She gave the following evidence in chief. The applicant was assigned to Vodacom but was asked to vacate the premises. The applicant never explained why he was asked to leave. He was then placed at the Johannesburg Property Company on a non-billable basis. It was hoped that he would be noticed, leading to the applicant rendering billable work. This did not happen. The property company requested that the applicant be removed from its premises. That was because the applicant did not allow other employees to do their work.
- [30] The respondent sought to obtain opportunities for the applicant at Standard Bank, Liberty and in Nigeria. Liberty retracted its opportunity. Standard Bank advised that it was not interested in the applicant. The client in Nigeria indicated that it wanted a white person.
- [31] She tried to encourage the applicant regarding opportunities, including getting the applicant to become involved in the rest of the business of the respondent. She suggested to the applicant that the applicant should consider sitting at the other building of the respondent. The applicant replied that he has a problem working with people. The applicant however eventually agreed to go to the other side of the building. She later realised that the applicant was not at work. The applicant had mentioned an opportunity at Standard Bank. She tried to contact the applicant for a follow-up regarding what he said about the Standard Bank opportunity. She could not locate the applicant. She sent him an email. The applicant did not reply to her e-mail.
- [32] Various opportunities were made known to employees including the applicant. This was done by email. The applicant did not apply for any of the positions. The applicant did not show any interest in training. The applicant told her that it was not his obligation to identify opportunities.

- [33] She met with the applicant on 6 March 2013. The applicant contended that the meeting was an attempt to retrench him. The applicant was told that that was not the case, but that the meeting was an attempt to establish why clients asked him to leave their sites. The meeting was to find out what was the problem. The applicant indicated during that meeting that he did not know why he was asked to leave the premises where he had been assigned to work. He was asked about his skills during the meeting. This was for finding him billable work. The applicant replied that he was not technical but was a process person.
- [34] The respondent called a general meeting with employees on 29 May 2013. It was explained during that meeting that the company was restructuring. The applicant told the managing director, following the meeting, that the applicant was aware of an opportunity at Standard Bank. The respondent has an employee, Alan Lewis, who is an account manager and is based at Standard Bank.
- [35] The applicant did not respond to her e-mails; including the e-mail that she sent on 11 June. She wanted to meet the applicant. She then met with the applicant on a Friday after 11 June. The applicant had not replied to the email. The applicant could not explain his whereabouts during the week. She asked the applicant about the Standard Bank opportunity and told the applicant that the economy was tough. The applicant asked her to set up a meeting with the managing director of the respondent. The applicant did not explain what the meeting was about.
- [36] The applicant was given a section 189 notice to attend a consultation on 19 June 2013. This was followed by a consultation on 24 June 2013. She prepared a minute of the meeting, which is a true reflection of what transpired during the meeting.
- [37] The Standard Bank opportunity was raised during the meeting on 24 June. Mr Van den Bosch asked the applicant about that opportunity, including the product and the person at the bank. The applicant did not know about the product or the person at the bank. The applicant further indicated that he did not answer yes or no questions. She asked the applicant, during the meeting, why the applicant did not reply to positions that were advertised internally. The applicant replied that he was not technical. The applicant would, during the meeting, sit back and say that he did not answer questions. The applicant accused her that it was her fault that the applicant had no work. He also accused her of being a racist. Mr Van den Bosch told the applicant during the meeting on 24 June 2013 that the applicant was wasting time.
- [38] She met the applicant on 25 June
2013. The applicant was aggressive towards her. She was concerned that the applicant might punch her. Dintle, a co-worker, placed herself between her and the applicant. The applicant told her that she was a racist unintelligent white girl and that the applicant would teach her a lesson. This incident took place in front of other employees.

- [39] The applicant never mentioned that he took up other employment. She established this fact from Pauline, who works for a recruitment company. Pauline was making enquiries about the applicant.
- [40] She gave the following evidence under cross-examination. She has no personal contact with clients of the respondent. Her information about the applicant and clients is based on other employees of the respondent. She concluded, following the meeting on 6 March, that there must be a reason why the applicant was asked to leave. She repeated her evidence regarding why the applicant was asked to leave the Johannesburg Property Company.
- [41] The applicant did not bring anything to the meeting on 24 June. He did not give details about Standard Bank. He did not want to answer questions. She had requested the applicant to give information on Standard Bank to Alan Lewis in order for Alan Lewis to follow up on the opportunity. Standard Bank is a client of the respondent. Standard Bank is a big organisation. This is why the respondent required the information from the applicant. The respondent would not refuse to place the applicant at Standard Bank.
- [42] The meeting on 24 June 2013 was a serious meeting on the part of the respondent. The applicant did not make contributions during the meeting.
- [43] The applicant was given alternative opportunities. Training was proposed to him told the meeting on 8 March. The applicant was asked about his skills. He said he was a process person.
- [44] The applicant sent a minute stating that the respondent wanted to retrench him. She told the applicant that that was not the case.
- [45] The following evidence was not contested: the applicant was asked to give information on Standard Bank to Alan Lewis in order for Alan Lewis to follow-up on the opportunity, the applicant did not tell the respondent that the applicant was employed, evidence on the demeanour of the applicant during the consultation meeting, in particular the evidence that the applicant would sit back and state that he does not answer questions, that the applicant said he was not a technical person with reference to possible alternatives, that the applicant was not interested in training, that the applicant was told that the economy was tough; and and that the applicant stated that he has a problem working with people.

Evidence by the applicant

- [46] He was not the only employee to return from Vodacom. He was asked to leave the Johannesburg Property Company because he had no work at that company. Andrew Cook had done all the work.
- [47] Consultants at the respondent were idle because the respondent did not have proper planning. The development unit failed to do its work. Six months without work was a long time. This would not happen in his business, because he would ensure that consultants were always billable.

- [48] He does not have the ability to seek out work. This is done by people employed to knock on doors for opportunities. He was employed as a consultant: he was not trained, nor did he have skills or time to seek opportunities.
- [49] The respondent did not do enough to find him alternatives. He could have provided assistance to the sales team. He was aware that the respondent lost the Liberty bid. He was also aware that other employees who were placed at Vodacom returned to the office whilst others went to another client.
- [50] He was aware of the opportunity at Standard Bank long before 24 June, after he received a call from professional career services. He pursued the opportunity only after he was told that he was to be retrenched. He concluded the contract with Standard Bank on 25 June 2013. The contract was for three months. It was later extended by six months.
- [51] He wanted to stay at the respondent. It was a permanent role. The respondent was a fantastic company to work for. The managing director of the respondent told him, on being advised of the opportunity at Standard Bank, that Standard Bank was a client of the respondent by a long shot. There were no further discussions about the Standard Bank opportunity after the “long shot” comment.
- [52] Hein, his immediate supervisor, told him on 5 March 2013 that there was a problem selling a product called PIMS and that the respondent was considering not hiring analysts. He was told also that the respondent would consider letting him go. It was obvious that Hein had made up his mind that the applicant was to be retrenched.
- [53] He met Hein and Ms Van der Westhuizen on 6 March 2013. Hein repeated what he told him on 5 March. Hein told Nadia to start the retrenchment process.
- [54] He knew that he had problems from 5 March. This became a reality on 6 March. He sent a minute regarding the meeting held on 6 March. Nadia and Hein told him that his minute was wrong. He subsequently requested the respondent’s managing director to intervene as he had lost faith on both Hein and Nadia.
- [55] He denied telling Nadia that he was not good working with people. He met with Nadia, who told him that he could not be kept because he was not billable. He was unhappy with the discussion and asked Nadia to set up a meeting with the respondent’s managing director. The meeting took place. Nadia and Hein also attended the meeting. He later received a letter to attend a consultation. The respondent was opportunistic in asking him to attend a consultation. He expected the meeting to discuss the

issues.

- [56] He took initiatives regarding work. Nadia knew about such initiatives, which included a conversation with Peter. Nadia never requested him to sit on the other side of the building. His job is to talk to people. He denied telling Nadia that he had a problem talking to people. It is his job to talk to people.
- [57] He did not apply for positions that were made known by email. He had no expertise. He would have taken the opportunity to learn new skills had he been told that he would be taught to do the job.
- [58] He was humble during the meeting on 24 June 2013. He was on the verge of losing his job. He mentioned during that meeting that he does not have the capacity to search for opportunities. Those present in the meeting did not get this point. He was cooperative and willing to explore options. His attempts were not given enough support.
- [59] He denied abusing Nadia on 26 June 2013. He went to the office to clear his desk. Nadia arrived and insisted that he leave immediately. He did not abuse anyone, verbally or racially.
- [60] The retrenchment process was rushed. There was no need for the retrenchment. There were no efforts by the company to find him employment. He could have been trained for other job opportunities within the respondent.
- [61] He gave the following evidence on cross-examination. He has vast experience in IT and was well connected. He understood how the respondent makes money and that he would ensure that every analyst in his company was billable.
- [62] He denied that the respondent went through every opportunity to make him billable. He does not know why he was asked to leave Vodacom. He was not the only person who was asked to leave Vodacom. He left the Johannesburg Property Company because he had nothing to do at that company.
- [63] He agreed that the respondent arranged for him to be interviewed at Standard Bank. He was however not told the result of the interview. Peter Bowden told him that the project at Standard Bank had been canned.
- [64] He denied that he did not provide information on Standard Bank. He was not asked for the information. He could not give information about Standard Bank when he was not asked for such information. In addition, the Standard Bank issue was raised only once. He told the respondent that Tata consulting had contacted him. He was aware of the Standard Bank opportunity at the time when Tata consulting contacted him.
- [65] He agreed that both the respondent and himself must contribute in trying to solve the problem. He received no alternatives in the form of training.
- [66] He denied that the previous meetings had to be taken into account in respect of the requirement for consultation. There was only one meeting to explore alternatives.

- [67] He was interviewed at Standard Bank opportunity before 24 June 2013. Standard Bank had not offered him a job by 24 June 2013. He knew by the 5th and 6th of March that he would be retrenched. He only went for the Standard Bank interview when it became clear to him that he might not have a job. The new job paid 25% more than the job at the respondent. He was employed at a higher rate from 25 June 2013 in the new job.
- [68] He admitted that he was non-billable for nine months. There would have been no need to get to the point of retrenchment if the respondent ran its business properly. Those at the respondent who were responsible for business development had to bring-in business. A business that is run efficiently would not have to retrench employees only because such employees are not billable. He denied that another company would have retrenched him following eight months of non-billable work after Vodacom. The respondent is a big company and it should not have had the need to retrench him.
- [69] He was not surprised on being retrenched. His surprise was that he did not receive the response that he expected and that a meeting to discuss issues was met with a section 189 notice. He denied that the respondent had no alternatives, after eight months, but to formalise the retrenchment process. That is because the respondent had capacity but did not do more. The retrenchment was unjustified and he should be compensated for being put in a horrible situation.

Analysis of the evidence

- [70] The applicant, on the evidence, was not particularly keen during the consultation meeting on 24 June
2013. His demeanour during that meeting demonstrates that there is substance to the evidence on behalf of the respondent that the applicant had already lined up a job with Standard Bank where he earned 25% more than at the respondent. The applicant approached the meeting on the basis of what he could get from the respondent by way of a package, which on the evidence was generous taking into account that the package included the applicant's salary for the month of June and for the month of July; together with the statutory payments based on the length of his service.
- [71] The applicant complained that the retrenchment process was rushed. There is no prescribed period for a retrenchment process. It is sufficient that there was substantial compliance with the requirements of section 189.
- [72] The respondent complied with the requirements in section 189. What is taken into account is, ultimately, whether there was an earnest attempt on the part of an employer to ensure that the retrenchment was a measure of last resort. Part of the respondent's business is to place its employees at clients of the respondents. The respondent then bills such clients for work done by such employees, which is described as billable work.

- [73] The applicant did not render billable work in a period of some eight months. He was the only employee in the respondent's consulting division who did not bring in revenue. The respondent continued to pay the applicant's salary notwithstanding the fact that the applicant did not bring any revenue; all this when the respondent's business was making a loss and when the salary costs exceeded revenue. The applicant did not challenge evidence that the respondent's business was making a loss.
- [74] The applicant does not dispute the need for retrenchment. His primary complaint is that there was no need for his particular retrenchment because of the alternative opportunity at Standard Bank and that the respondent failed to act on that opportunity. This opportunity, according to the applicant's pleaded case, was an alternative to the applicant being retrenched.
- [75] The respondent requested the applicant on multiple occasions to give information regarding the opportunity at Standard Bank. The applicant did not give such information. This evidence was not challenged during the cross-examination of witnesses for the respondent. Indeed, it would be illogical for the respondent, given that the respondent was making a loss, to ignore an opportunity to place the applicant at Standard Bank and yet continue to pay the applicant his salary. The attempt by the applicant during his evidence in chief to challenge this evidence was belated.
- [76] The applicant suggested that the respondent did not pursue the opportunity at Standard Bank because the respondent's managing director told the applicant that Standard Bank was a client of the respondent by a "longshot". It was not put to the respondent's managing director that the respondent did not pursue the opportunity because Standard Bank was a client of the respondent by a "longshot". In addition, the applicant did not give evidence that the expression "longshot" meant that the respondent would not explore the opportunity at Standard Bank. It would be nonsensical, as pointed out by the respondent's managing director, for the respondent to forego an opportunity to place the applicant at Standard Bank when the applicant was the only non-billable consultant; and when the applicant continued to receive his salary.
- [77] The respondent, acting independently, sought to place the applicant at Standard Bank. Standard Bank wasn't interested. The respondent would not have bothered to arrange that the applicant be interviewed at Standard Bank if the respondent never intended to place the applicant at Standard Bank.
- [78] The applicant's complaint about the Standard Bank opportunity strikes me as an after-thought on his part; to lurch onto some plausible excuse in challenging his retrenchment. The evidence shows that the respondent put the applicant's name forward whenever there was the prospect of an opportunity. This is illustrated by the opportunity in Nigeria and that at Liberty. It was in the interest of the respondent to find an opportunity for the applicant to do billable work. The applicant failed to establish that the respondent was indifferent to finding opportunities for the applicant.

- [79] There was some dispute whether the applicant already had been offered a job at Standard Bank on 24 June 2013, when the consultation took place. The applicant started working at Standard Bank on 25 June 2013. The applicant denied that he was offered a job as at 24 June 2013. I find that it is more probable that the applicant already had been offered the job at Standard Bank before 24 June
2013. This explains his behaviour during the meeting on 24 June 2013; when he adopted a carefree attitude by folding his arms, sitting back on his chair, and refusing to answer questions. His behaviour accords with the attitude of a person who knew that he had already secured a new job. I agree that the applicant was interested only in the package that he might get from the respondent.
- [80] The evidence does not support the applicant's contention that there was no need for his retrenchment because there was an opportunity at Standard Bank, which the respondent ignored.
- [81] The applicant did not dispute the evidence regarding the financial position of the respondent. He did not dispute the evidence on behalf of the respondent that he was retrenched on account of that financial position. The respondent had a lawful basis for retrenching the applicant.
- [82] The applicant complained that the retrenchment process was "too short". A retrenchment that is undertaken within a short period does not necessarily mean non-compliance with the statutory requirements. There is, in any event, no requirement that the process should be of a particular duration. What matters is whether there was substantial compliance with the requirements set out in section 189. The respondent gave unchallenged evidence that the respondent was going to suggest alternatives to retrenchment during the meeting on 24 June 2013. The applicant frustrated a meaningful consultation by his non-committal to the issues discussed and to be discussed at that meeting. The respondent cannot be faulted for its stance in the light of the applicant's unwillingness to deal seriously with the issues pertaining to his possible retrenchment.
- [83] The respondent was prepared to put alternatives to retrenchment to the applicant during the meeting on 24 June 2013. That did not come to pass because the meeting degenerated on account of the stance adopted by the applicant. As stated above, the applicant had no real interest in discussing issues that should form the subject matter of a consultation. He had already secured a job with Standard Bank. Indeed, he started working at Standard Bank on 25 June 2013, a day after the consultation.
- [84] The applicant failed to show that there he should not have been retrenched. I equally find that the applicant failed to substantiate his claim that the respondent did not comply with the procedural requirements set out in section 189.
- [85] I make the following order:

1. The claim by the applicant is dismissed.
2. The applicant is ordered to pay the costs.

O Mooki

Judge of the Labour Court (Acting)

Appearances:

For the Applicant: H Bucksteg

Instructed by: Carel J. Schoeman Inc

For the Respondent: P Kirstein

Instructed by: Van der Merwe & Associates

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Prepared on 13 October 2026 · Esheria