

SOUTH AFRICA / JUDGMENT

Stander v Services Seta-Education and Training Authority (D214/13)

[2015] ZALCD 68 (5 November 2015)

[2015] ZALCD 68

COURT
Labour Court Durban

BEFORE
Cele

CASE / FILE NUMBER
D214/13

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IN
THE LABOUR COURT OF SOUTH AFRICA
(HELD AT DURBAN)
Reportable

Case Number: D214/13
In

the matter between: AN-SORIETA
STANDER
Applicant
and
SERVICES SETA-EDUCATION
AND TRAINING
AUTHORITY
Respondent
Heard: 25 March 2015
Delivered: 05 November 2015.
Summary: Claim
of unfair dismissal – retrenchment - when
an employer embarks on a retrenchment exercise it is implicit in
terms of section 189(2) that the employer should
also take substantive steps to avoid a dismissal – job transfer
- negative
effect of the transfer of the post has materially been mitigated by
the failure of the applicant to accept the reasonable
alternative job
offer.

JUDGMENT

CELE J

Introduction

[1] This is a claim in terms of section 189 of the Labour Relations Act[1] of unfair dismissal of the Applicant by the Respondent occasioned by the operational requirements of the Respondent. The issue for determination is whether the Applicant was dismissed for substantively fair reasons and in a procedurally fair manner. If the result of this enquiry is that the dismissal was unfair, the issue of appropriate remedy will arise. In this respect, the Court must consider the issue of reinstatement or compensation. The Respondent opposed the claim with a contention that the dismissal of the Applicant was for substantively fair reason and was carried out fairly. It was said that the Applicant was not entitled to any compensation in light of the fact that she unreasonably refused an offer, made in Court, of financial compensation, equivalent to six months and that she was in fact paid in excess of the payment allowed under the Basic Conditions of Employment Act.[2]

Factual

Background

[2] The Respondent is the Services Sector Education Training Authority. It is one several sector education training authorities established in terms of the Skills Development Act[3]. The scope of the Respondent is vast and incorporates every other sector which is not covered by the other sector education training

authorities. The Respondent had various offices throughout the country. One of its offices was in Durban, where the events leading

to this trial occurred as the Applicant was based there. She first joined the Respondent, in 2007, as a Secretary, on a fixed term

contract. At the times material to this matter, she had been promoted to the role of Divisional Coordinator. On 18 March 2012 her fixed term employment contract was extended until 31 March 2016.

[3] The Respondent was placed under administration by the Minister of Higher Education, in April 2011. Consequent upon this Dr Sihle Moon was appointed as an Administrator. One of the decisions taken by Dr Moon was the restructuring of the Respondent. This entailed the adoption of a new employment structure and the population of that structure. The employees were then matched according to the new structure. The Applicant's substantive position was in the projects office, which was initially located in Durban. As a result of the restructuring, the decision was taken to move her position to Johannesburg. Dr Moon appointed consultants to assist him to prepare a new organizational structure.

[4] The Respondent consulted with trade unions operating in its workplace, the United Association of South Africa (“UASA”)

and the National Education Health and Allied Workers Union (“NEHAWU”). The outcome of this consultation was an agreement in certain principles pertaining to the new structure and its population. The Respondent prepared a leaflet and circulated it among staff and the agreement reached with the Unions was recorded in the follows terms:

“Migration Process

A committee comprising of representatives from UASA, Nehawu, HR and Management have been hard at work with regards to the migration

process. The members have been responsible for migrating staff from the old structure into the new structure. The process was as follows

Process 1

- In migrating staff the committee looked at existing appointments that are on the company records as per individual contracts of employment and existing old structure.
- As a starting point, the committee identified positions that existed within the old structure and were also reflected in the new structure. In these instances staff members were moved across as is into the new structure. These were straight forward logical matches. For instance, a secretary in the old structure would move to a secretary position in the new structures.

So for all intents and purposes nothing has changed for this group of employees. The HR department will then be sending them letters

confirming that they still hold the same positions.”

[5] The leaflet also stated that:

“The writing of the job descriptions and job grading is in progress as these are the two key HR activities outstanding OD project. The consultants assisting with this project are progressing well and a number of draft job descriptions have been completed.

...

The job grading committee made up of representatives of UASA. Nehawu and Management have undergone job grading training and will be grading all non-management jobs commencing in June...

On completion of the job evaluation process, we will be issuing individual letters confirming job title, job grade and salary.”

[6] The Projects Office was relocated to Johannesburg, under the office of the Chief Executive Officer. The reasons for this were stated to be two fold. The first was to improve efficiency in that most functions, such as human resources and finance were located at the Head office,

in Johannesburg and it was not making operational sense that the project office was run from Durban, which was a regional office. Secondly, the projects function was a national, rather than a regional function. As most functions were located in the national office, it was important that the projects office was also moved to Johannesburg. According to the Respondent the proposal to move the Projects Office was also discussed at the committee comprising management and trade unions. They agreed to the relocation of the office. Once the agreement was reached, the parties then went about the execution of the decision.

- [7] The creation of the organizational structure was completed in April 2012 and the Respondent disseminated it across the staff. There is an issue whether all staff received the new organizational structure. The Applicant said that she received a copy of two pages, reflecting the structure at the Johannesburg office and the structure at the Durban office, in about April or May 2012. There is also an issue whether the Applicant was offered her position in the new structure after it was moved to Johannesburg. But it is common cause that she was offered a position in Durban, by means of a letter from the Respondent dated 18 May 2012 which read:

“Confirmation of migration to the new organizational structure

Dear Anso Stander

We have pleasure in confirming your migration into the new SSETA organizational structure as an Officer: Region in the KwaZulu Natal

Provincial Office with effect from 1 June 2012. All your current benefits and conditions of employment will remain unchanged. Please

note that your job title is subject to change based on the outcome of the job evaluation process.

We thank you for your patience during OD process and we look forward to a continued fruitful and mutually rewarding experience.”

- [8] The Human Resources Manager for the Respondent at the relevant time was Mr Sibongiseni Gumede since January 2012. At the time of the trial he was no longer employed by the Respondent. He co-signed the letter of 18 May 2012 together with Dr Moon. The Applicant responded to this letter on 29 May 2012 by stating that:

“Acknowledgement of receipt of migration letter

This letter serves as an acknowledgement of receipt of the migration letter dated 18 May 2012, and addressed to myself A Stander.

However, kindly note I do not accept the lower position I was migrated to, as an “Officer” in the regional office.”

- [9] Mr Gumede responded by an electronic mail to the letter of 29 May 2012 and the Applicant reciprocated by a letter of 31 May 2012, saying that:

“1. Based on the new organizational organogram that was (that was only emailed to head office staff and managers, regional staff was excluded) which is now in circulation amongst all staff, it is apparent that management proposed that I be transferred out of my current position as a ‘National Project Management Co-coordinator’ (positioned in a National division) to a more junior position as a ‘regional officer’. With respect to the proposed transfer, effectively, a significant demotion that seriously affects my present status in the organization and also presents serious prejudice to my future prospects and my future in the organization, which for obvious reasons I cannot accept.

2. Based on the new organizational organogram in circulation it would appear that I have been replaced by either ‘Danier Harmsen’ or ‘Siphiwo Ndawo’ of which at least one of the abovementioned colleagues, are effectively junior to me. Once again I am sure that you would understand, under the circumstances that I consider my proposed demotion unacceptable and therefore reject such proposal outright.”

[10] The evaluation process which was mentioned in the letter of 18 May 2012, conducted by a committee made up of trade unions and

management, was undertaken. The applicant was thereafter informed that her position title would be called “Administrator”

and that it would be graded “B Upper”. At the relevant time the Applicant was a member of the Trade Union. A meeting was arranged with the Administrator to address concerns of the Applicant. It was scheduled to take place by way of a telephonic

conference on 16 July 2012. The conference did not proceed as the Administrator cut the call when he realized that the Applicant had brought along to the telephonic conference meeting a labour arbitrator, Mr Dave Manthey as her representative. On 27 July 2012

the Respondent sent a letter to the Applicant in which it set out the negotiation process and confirm that the process was still at level two, and it proposed that a further meeting be set up with Dr Moon.

[11] On 27 July 2012 the Applicant sent an electronic mail to Mr Gumede asking him to furnish her with a copy of the agreement entered into between SSETS and the Unions. The response of 30 July 2012 informed the Applicant that the agreement was verbal as it was not reduced to writing. She was advised to confirm that information with the union she was a member of. On 13 August 2012 the Applicant sent yet another electronic mail to Mr Gumede asking if she would receive her salary in that month. She also asked to be advised in writing of what her position within the services of the Respondent would be. Mr Gumede couched his response in the following terms:

“Yes you will be receiving your salary this month. As indicated you have exhausted your annual and sick leave and we will to talk about this on your return.

Following the job evaluation process the position that is offered to you is Administrator: Region. Your current total cost to company salary will remain as is.

Please confirm your response on this matter.”

[12] After some 40 minutes Mr Gumede sent another electronic mail to the Applicant saying that:

“We are waiting your response on our email dated 27th July 2012 which is attached to this correspondence. See attached extract from that mail.

As a way forward we would like to reschedule another meeting with you. It could be a teleconference, you could come to Johannesburg or Dr Moon can see you when he does his regional visits in two weeks’ time.

Kindly advise what you intend doing.”

[13] Still on 14 August 2012 the Applicant responded to Mr Gumede by electronic mail in which she said that:

“As per my previous correspondence to you in writing I have declined the position in the regional office. And as per your email I am still awaiting your response to my letter in writing.”

[14] A further meeting took place on 30 August 2012 at the Respondent’s Durban office attended by Mr Gumede and the Applicant. Dr Moon was not in attendance as promised in the Respondent’s letter dated 27 July

2012. At this meeting the office files which had been attended to by the Applicant and had been removed from the Applicant were identified to Mr Gumede. There is a dispute on whether the Applicant’s placement issues were discussed in that meeting and in the absence the Administrator.

[15] What further complicated the issues between the parties was that the Applicant reported that she was unwell with the result that she was away from the work place during the period 16 June 2012 to 18 August 2012. She received communication from the Respondent on this issue thus:

1. On 11 May 2012, the Applicant was informed by Ms Francina Kanyane that she had exhausted her annual and sick leave. And that she would not be allowed to take further paid leave. Any leave taken would be unpaid leave.
2. On 23 July 2012 the Applicant was also informed that she did not have additional sick or annual leave available and that her absence would be regarded as unpaid leave in terms of policy.
3. On 14 August 2012 the Applicant was also informed that her sick and annual leave was exhausted.

- [16] Another complicating factor was that the Applicant stopped coming to the office, saying that her files had been taken away from her and there was no work for her to do. The Applicant's substantive position had moved to Johannesburg where projects were being carried out. The Applicant had refused to accept the position offered to her in Durban of Officer Region as such she could not be given a "job description".
- [17] On 5 October 2012 the Applicant received a retrenchment letter. On 17 October 2012 the Applicant responded to the retrenchment letter by confirming that she remained committed to a consultation process, indicating an interest in the transfer to the Johannesburg office. The Respondent declined her request for a further consultation on 30 October 2012, recording that her last day of service was 31 October 2012. Her colleagues were informed that her services had been terminated following failure between parties to reach agreement on migration.

Evidence

- [18] That the Applicant was dismissed by the Respondent for its operational requirements remained common cause between the parties.

The Respondent had then to prove that a fair reason for dismissal underpinned its conduct which was carried out fairly. Mr Gumede was the only witness called by the Respondent and the Applicant was the only witness in her case.

- [19] Mr Gumede testified that he had a meeting with the Applicant either in April or May 2012 but that he could not remember the exact date. It was in that meeting that a position in the national office in Johannesburg was offered to her. The position would have been a lateral transfer from Durban to Johannesburg. He said that she indicated that she would not be interested in the Johannesburg position at that time as her husband, a military pilot, would not have been able to relocate. No records or any written communications confirming this meeting were however kept. The Applicant denied that this meeting ever took place and contended that the first time she was aware of the position in Johannesburg was when she received a retrenchment letter in October 2012. She said that if asked to move she would have agreed as her husband would relocate to Waterkloof base in Pretoria. Mr Gumede testified that he had another meeting with the Applicant in the Durban office in August 2012 when he made use of the opportunity to address her apparent misunderstanding of the process. He denied that the issue of discussion was limited to the files, saying that he had come down to discuss the concerns of the Applicant.
- [20] Mr Gumede maintained that the organizational structure was circulated to all offices. The Applicant denied receiving a complete copy of the structure. She said that she received from colleagues a two page document and that in terms of it her position was in Durban and not in Johannesburg.

- [21] In her evidence the Applicant said that she had declined the position in the Durban Regional office because accepting it would have amounted to accepting a demotion in that she would be required to report to Ms Nerisa Beecum, who had previously reported to her. She also said that the position would carry a lower grade compared to her previous position of Divisional Coordinator. Although the Applicant's previous position as Coordinator was graded C, the new position was graded "B Upper".
- [22] Mr Gumede could not confirm in what manner the Applicant was informed that there was a retrenchment process underway which could have resulted in a dismissal in the event relocation was not accepted. The Applicant insisted that she only became aware that she might be dismissed if she failed to accept a re-deployment when the retrenchment letter dated 5 October 2012 reached her.
- [23] Both parties presented written submissions with the Applicant praying for a finding that her dismissal was substantively and procedurally unfair and the Respondent contending that the probabilities favoured its case and therefore that the claim ought to be dismissed.

Evaluation

- [24] Sections 185 and 188 of the Act protect employees against unfair dismissal. Section 185 of the Act accords every employee a right not to be unfairly dismissed while section 188 defines a dismissal which is unfair, as including a dismissal where the employer fails to comply with a fair procedure. The Respondent averred that it was due to its operational requirements that it dismissed the Applicant. The term "operational

requirements" is defined in section 213 of the LRA to mean "requirements based on the economic, technological, structural

or similar needs of an employer." This definition is also contained in the Code of Good Practice on Operational Requirements passed under the Act, which provides this definition of operational requirements:

"As a general rule, economic reasons are those that relate to the financial management of the enterprise. Technological reasons refer

to the introduction of new technology which affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace. Structural reasons relate to the redundancy of posts consequent to a restructuring of the employer's enterprise."

- [25] The change of structure which took place at the Respondent qualified as an operational reason. The reason behind the introduction of the structure was to attain optimum use of resources and to streamline activities by consolidating head office activities, including the Projects office. This much remained unchallenged throughout the trial. It is perfectly rational for an employer to restructure its operations in order to achieve operational efficiency. The mitigating factor is that this process was carried through with the

involvement of the trade unions operating in the workplace. The real challenge in this matter lies in how the Respondent went about populating the new organizational structure.

- [26] When an employer embarks on a retrenchment exercise it is implicit in terms of section 189(2) that the employer, apart from taking part in formal consultations on the aspects set out in this section, should also take substantive steps on its own initiative to take appropriate measures so as to avoid a dismissal,[4] hence the meaningful joint consensus seeking process. Therefore where there are reasonable prospects of avoiding dismissal steps should be taken to salvage the loss of employment. It is now trite that retrenchment must be a measure of last resort. Finding a solution should require no special expertise as it should be a matter of common sense. The court must objectively look at the procedure that was followed and determine if dismissal could not be avoided.[5]
- [27] The Respondent complied with the agreement it reached with the trade unions in the creation of its new organizational structure. The migration process had stages depending on whether the positions dealt with were prior existing or new. These stages for new positions or just changes, such as relocation, left room for relief in terms of the Act for any disgruntled employee. The migration process was therefore a distinct exercise from any relief in terms of the Act. The migration process was never intended to replace or override the peremptory provisions of the Act, such as a compliance with the provisions of section 189 (3) of the Act. It could not do so.
- [28] It remained common cause in this matter that the Respondent never issued the peremptory written notice in terms of section 189 (3) of the Act so as to kick-start the retrenchment process. This failure was responsible for confusion which prevailed throughout the process that unfolded, ultimately leading to the dismissal of the Applicant. Section 189 (1) (d) envisages a consultation process between the employer and an employee likely to be affected by the proposed dismissal or his or her representative nominated for that purpose. Except to say the process was still internal, no evidence was ever produced in the trial to show why the Applicant's nominated representative, Mr Dave Manthey, could not participate in the consultation process.[6] The refusal to accept Mr Manthey was the second step by the Respondent in compromising the integrity of the consultation process,
- assuming for a moment that this was the first consultation step.
- [29] The process was complicated by the fact that once the evaluation process mentioned in the letter of 18 May 2012 was conducted the Applicant was informed that her position title would be called "Administrator" and that it would be graded "B Upper". But no written notification was made to her that she was migrated to Johannesburg as the information on the leaflet promised. This would have dispelled any doubt about the initial position offered to her. Further, while the Respondent maintained that it circulated the new organogram to its entire staff, no such proof was produced during the trial. There is thus no reason to reject the evidence of the Applicant that she received from some colleagues a two paged document which was an incomplete organogram.

- [30] When the Respondent scheduled a consultation meeting with the Applicant to be held in Durban, the plan was to have Dr Moon in attendance. He was the decision maker. For unknown reasons he never made it and further doubts exist of what took place as no records were kept of the meeting. In scheduling this meeting the Respondent had on 27 July 2012 sent a letter to the Applicant confirming that the process was still at level two. It is not clear if the Respondent understood this to be level two of the migration process or that it had progressed to a retrenchment stage.
- [31] As far late as August 2012 parties were not clear about progress in the position of the Applicant. On 13 August 2012 the Applicant sent an electronic mail to Mr Gumede asking if she would receive her salary in that month. She also asked to be advised in writing of what her position within the services of the Respondent was. The response told her she would be paid and further said that following the job evaluation process, the position that was offered to her was Administrator: Region. Her total cost to company salary would remain unchanged. It said nothing about the stage how far the consultation progress was, any time frames within which the job-offer could be accepted and the consequences of not accepting it. The respondent's wrong doings in the retrenchment process are mainly procedural in nature.
- [32] One thing clear though about this letter from Mr Gumede was that her total cost to the company salary would remain unchanged. This should have dispelled any anguish on the Applicant that the migration process demoted her work status. That she would be required to report to Ms Nerisa Beecum, who had previously reported to her turned out to be unfounded. In the old position she collated information from the region as a representative of the national office and forwarded it to the national office in Johannesburg. This did not make her senior to all staff in the regional office. She also said that the position would carry a lower grade compared to her previous position of Divisional Coordinator. Although the Applicant's previous position as Coordinator was graded C, the new position was graded "B Upper". The position offered to her in Durban was therefore in par with or at worse, almost in par with that of the Divisional Coordinator. It was the closest fit to her previous position. She would be based in the same establishment thus obviating the negative consequences attendant to a transfer.
- [33] From 13 August 2012 to 5 October 2012 when the Applicant received a letter of retrenchment she had been given sufficient time to ponder on her position. By this time she was back from her sick leave. She really had no work to do and so cannot be heard to have had no time to reflect. On substantive fairness the Respondent did not want to dismiss the Applicant as a result of the migration process. It offered her a reasonable alternative job offer. No evidence led by the Applicant justified her rejection of the alternative employment, which offer would have taken care of the remaining fixed term employment contract. The negative effect of the transfer of the post of the Applicant to Johannesburg has thus been materially mitigated by the failure of the Applicant to accept the reasonable alternative job offer. Her dismissal due to the operational requirements of the Respondent has consequently not been shown to

have been unfair.

[34] At the commencement of the trial, Mr Ngcukaitobi for the Respondent places it on record that an offer of financial compensation

equivalent to six months of her salary was made to the Applicant. Mr van Lingen appearing for the Applicant confirmed the rejection of that offer. Mr Ngcukaitobi said that the Applicant had been paid by the Respondent in excess of the payment allowed under the Basic Conditions of Employment Act.[7]

[35] In respect of the severance pay claim, the law is trite. Where an employer arranged alternative employment for an employee and the employee rejected the alternative employment for no sound reason, severance pay should not be paid to such employee.[8] In *Astrapak Manufacturing Holdings (Pty) Ltd t/a East Rand Plastics v Chemical Energy, Paper, Printing, and Allied Workers Union*,[9] Court held per Davis JA that:

“Assuming in favour of the respondent’s members, and that their failure to raise objections to the alternative offer was not definitive of the resolution of the dispute, the reasoning adopted in Irvin and Johnson Ltd, supra regarding s 41(4), as applied to the present dispute, is dispositive: An employee, who rejects an employer’s offer of reasonable employment for no sound reason cannot then claim severance pay. If an employer such as the appellant offers an increased amount or, at the very least, the same amount, viewed within the context of the specific conditions of employment that cannot on any reasonable basis be taken as more onerous than that which existed prior to the retrenchment exercise, and if an employee refuses to accept such an offer, that refusal is then unreasonable.

[36] In consequence, I find that the dismissal of the Applicant by the Respondent on its operational requirements was substantively fair but procedurally unfair. I also find that the Applicant is not entitled to any severance pay and I proceed to issue the following order:

1. The Respondent is ordered to compensate the Applicant in an amount equivalent to three months of the salary she earned on the date of her dismissal, due to her dismissal being procedurally unfair;
2. Such payment is to be made within 14 days of the date of this order;
3. No costs order is made.

Cele J

Judge of the Labour Court of SouthAfrica.

APPEARANCES:

For the Applicant: Mr A van Lingen

Instructed by Randles Inc.

For the respondent: T Ngcukaitobi

Instructed by Maserumule Inc.

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

[2] Act Number 73 of 1997 (“the BCEA”)

[3] Act Number 97 of 1998

[4] See *SACCAWU v Afrox Ltd* (1999) 20 ILJ 1718 (LAC).

[5] See *CWIU v Algorax* (2003) 24 ILJ 1917 (LAC).

[6] See *Workers Labour Consultants obo Petros Khoza v Zero Appliances CC* [1999] 11 BLLR 1225 (LC).

[7] Act Number 75 of 1997.

[8] *Irvin and Johnson Ltd v CCMA* (2006) 27 ILJ 935 (LAC).

[9]

(2014) 35 ILJ 140 (LAC).

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