

SOUTH AFRICA / JUDGMENT

Van Haght v JBS Building CO (Pty) Ltd (C95/2023) [2024] ZALCCT 37; (2024) 45 ILJ 2629 (LC) (6 September 2024) [2024] ZALCCT 37

COURT
Labour Court Cape Town

BEFORE
Meyerowitz

CASE / FILE NUMBER
C95/2023

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FLYNOTES: LABOUR – Dismissal – Operational requirements –
Alleged
that company wanted to get rid of employee due to personal animosity – Company running at loss for nearly two years –
Decision to restructure company was rational and reasonable –
Decision to make certain positions redundant was also rational and
reasonable – Employee produced laundry list of grievances and affected to call it an unfair retrenchment
– Dismissal
was procedurally and substantively fair – Labour Relations Act 66 of 1995, s 189.
THE LABOUR COURT OF
SOUTH AFRICA, CAPE TOWN
Reportable
Case no: C95/2023

In the matter between: CELESTE
VAN HAGHT
Applicant
and
JBS
BUILDING CO (PTY) LTD
First
Respondent

Heard: 26 & 27 February 2024; 26 March 2024

Delivered: 6 September 2024
This judgment was handed down electronically by emailing a copy to the parties. The 6th of September 2024 is deemed to be the date of delivery of this judgment.

JUDGMENT

MEYEROWITZ AJ

Introduction

[1] The respondent (the Company) provides building contractor services to construction companies, the insurance industry and to private homes. On 1 November 2022 the Company issued the applicant (Ms Van Haght) with a notice in terms of section 189(3) of the Labour Relations Act[1] (LRA) and she was ultimately retrenched on 18 November 2022. Ms Van Haght has referred a dispute to this court claiming a) that her dismissal was substantively and procedurally unfair, and b) that she was short paid during her notice period.

The evidence before this court

[2] The Company's managing director (MD), Mr Dane Thomson (Mr Thomson), testified that the Company made a R2.8 million loss for the financial year ending February 2022. Mr Thomson and the Company's two other directors felt that the loss could largely be attributed to a lack of effective project management and site supervision. At the time the Company's cost

estimators ran their own individual building projects, so the directors decided to hire a dedicated project manager and two site

supervisors to oversee all building projects and hopefully improve efficiency. At that stage Mr Thomson had the additional

responsibility of attending to most of the company's high level human resource (HR) requirements, and the directors felt that hiring a dedicated HR manager would a) free up Mr Thomson to concentrate on other aspects of the business, and b) help the company "build a better team that is capable of managing the scale of our operations". As a result, in March 2022 the Company hired Ms Van Haght as its HR manager, and in April 2022 the Company hired a Mr Van Rooyen as its senior project manager and Messrs Bezuidenhout and Sallies as site supervisors.

[3] Unfortunately the strategy did not work. Between March and October 2022 the Company made a further loss of R3.9 million, and the directors decided to restructure the Company. The restructuring involved making the business, in the words of Mr Thomson, "leaner, less top-heavy, so to speak, and that could make us more effective and efficient in the process" and "we made the decision to revert back to how we previously operated with the... cost estimators running their own projects...". The decision on [Ms Van Haght] was because in

the history of the business, I always basically managed the HR function myself, and in recent years tried to capacitate that space and because I was confident in being able to manage it, I didn't feel it was necessary. And because of the situation at the time, the company was in financial distress, and a lot of the strategic objectives that we were trying to do, it wasn't really the priority of the day anymore. It was now just about surviving and being able to operate at the minimum viable level". So, in essence, the company reverted to the pre-March 2022 model by making the positions of senior project manager, site supervisor and HR manager redundant.

- [4] On 1 November 2022 the Company issued section 189(3) notices to Ms Van Haght and to Messrs Van Rooyen, Bezuidenhout and Sallies, which notices prima facie fully complied with the requirements of section 189 of the LRA by stating, inter alia, the following:

"The company is in a significant financial loss position and is experiencing financial difficulty. Urgent action is needed to restructure the business's operations more cost effectively to facilitate a successful turnaround and get the business back into a profitable and more sustainable position. The business's objective is to focus on strengthening the core business of selling and delivering building services and the intended restructure aims to achieve that. In order to achieve this, the company proposes restructuring for financial and operational requirements as follows:

– HR Department (Rationale)

Position Affected: HR Manager

Currently the business does not need the services on an HR Manager, and the function is considered to be non-core, which can be outsourced on an ad-hoc basis. In the current circumstance, the HR Manager position is considered to be an expensive salary that is surplus to needs and a luxury that the business can no longer afford. At this point, the business only needs its minimum administrative HR needs taken care of, which is best suited to the position of an HR Officer at significantly less cost than that of an HR Manager's salary. The current circumstance has necessitated that, Dane Thomson, Managing Director, to step in closer to managing business operations and has agreed to attend to the HR 'management' needs in the business. The business intends to outsource HR support services on an ad hoc basis to minimize monthly costs...

...Alternatives considered and action taken to improve the profitability of the company

The company has considered implementation of short time in order to reduce labour overheads but this is not a viable for our current circumstance and as a short term or long term option, and shall have a negative impact on production, retention of skills and overall business performance.

The company has considered other alternatives such as salary reductions and the scrapping of annual bonuses as measures to avoid or reduce dismissals if necessary. The consideration of such alternatives must, however be sufficient to address the company's overall economic and financial position in the long term and remain practical to implement without resulting in a negative impact on productivity and loss of skills.

Other than the above, the company has not identified any other reasonable alternatives to retrenchment but is open to consider representations from you.

- [5] On 3 or 4 November 2022 Ms Van Haght sent a letter to Mr Thomson via email in response to the section 189(3) notice. However, the letter itself was not included in any bundle of documents before this court.[2] It is nevertheless apparent from witness testimony that the only relevant issue raised by the letter was a request to see the Company's audited financial statements. On 8 November 2022 Mr Thomson sent an email in response to the letter saying, "With regard to your request for the company's financials, a report will be provided at the consultation meeting which you can view".
- [6] On 11 November 2022 a retrenchment consultation was facilitated by an external labour consultant by the name of Mr Jan-Hugo Roothman (Mr Roothman), and attended by Mr Thomson and the four potential retrenchees. Mr Roothman testified that at this consultation he went through the contents of the section 189(3) notice but that Ms Van Haght "was not very receptive to anything that we wanted to discuss with her".
- [7] Mr Thomson explained that he did not want to provide Ms Van Haght with a full set of the Company's financials for reasons of confidentiality, but instead extracted a profit and loss report from the Company's accounting system (which report clearly demonstrated the Company's financial problems described above). During the consultation Mr Thomson tried to hand over the report to Ms Van Haght, but she refused to even look at the document saying that she was only prepared to look at the audited financial statements. During cross-examination Mr Lawrence for the Company said to Ms Van Haght, "But why did they need to be audited financial statements? Why could they not just be ordinary financial statements?" To which Mr Van Haght replied, "I can't answer that".
- [8] Mr Roothman testified that during the consultation they discussed an alternative to retrenchment being Ms Van Haght taking up the position of HR "administrator" at a reduced salary. It is common cause that the Company ultimately offered Ms Van Haght the position of HR administrator at a reduced salary of R8000 per month, representing a R27,000 reduction in salary from R35,000 per month. On 15 November 2022 Ms Van Haght formally rejected this offer in email correspondence saying that the offer was unreasonable.
- [9] On Wednesday, 16 November 2022 Ms Van Haght was issued with a retrenchment letter explaining that her last day of work would be Friday, 25 November 2022. On Friday, 18 November 2022 she sent Mr Thomson an email saying, "Please find enclosed the handover you requested, all documents and files are readily available and quite easy to find, as this was what we discussed upon joining the business, that should someone leave, the tools to perform the role should be a smooth

transition. Further to that, I would like to request immediate release of my role, and for the same payment date as the site supervisors being 21 November 2022, The reason for this is the environment has become

quite unbearable and leaves me with not much to achieve since my role has already been made redundant” (my emphasis). Mr Thomson testified that he “agreed to her request” and therefore only paid her up until 18 November 2022.

- [10] The main thrust of Ms Van Haght’s case on substantive unfairness was that she was retrenched, not for genuine operational reasons, but because she was, according to her statement of claim (SOC), “selected for retrenchment on the basis that she challenged the [directors’] decisions insofar as it related to Human Resource functions and Mr Thomson was aggrieved by the fact that he was being challenged”. This argument was based on two incidents that took place before the section 189(3) letter was issued on 1 November 2022. The first incident relates to the appointment of a financial manager in September 2022 by the name of Ms Laeeqah De Lily (Ms De Lily), and the second relates to Ms Van Haght’s working conditions.
- [11] Regarding the first incident Ms De Lily testified that, upon her arrival at the Company, she noticed that the HR department was in charge of implementing wages and salaries, and that the finance department had no oversight over this function. She then had a meeting with Mr Thomson whereafter he decided that, going forward, after the HR department had calculated all wages and salaries, the finance department would confirm the accuracy of these calculations before they were paid out. Mr Thomson then told Ms De Lily to talk with Ms Van Haght about the logistics of the new oversight policy. According to Ms De Lily the new oversight policy “wasn’t taken very well” by Ms Van Haght, and then Ms Van Haght said (apparently in a fit of sarcasm) “Well, then in that case, the finance department can just take over the running of the entire payroll”. On the strength of this statement Ms De Lily told Mr Thomson that Ms Van Haght no longer wanted to have the payroll function in the HR department, and the payroll function was duly taken away from the HR department.
- [12] Regarding the second incident Ms Van Haght complained that her office was smelly, and that she was not provided to with the necessary tools to perform her duties (such as a printer and sufficient plug points). The evidence reveals that Mr Thomson at least made an effort to address these complaints. Given the findings I make in this matter, whether these efforts were “sufficient” is not something that needs to be determined by this court.

Application of the law to the facts

- [13] After considering the pleadings and the evidence, it is clear to me that I am only required to decide three legal issues. The first issue is whether Ms Van Haght’s dismissal for the stated reason of “operational requirements” (i.e. retrenchment) was both substantively and procedurally fair. The second but interrelated issue, is whether Ms Van Haght’s retrenchment was merely a ruse and that she was actually dismissed because Mr Thomson did not like the fact that she was challenging his authority (what I shall call the “personal

animosity claim”). The third issue is whether or not Ms Van Haght was short paid during her notice period.

- [14] Regarding substantive unfairness, the Company had been running at a loss for nearly two years making the directors’ decision to restructure the Company perfectly rational and reasonable. The decision to make the positions of senior project manager, site supervisor and HR manager redundant was also perfectly rational and reasonable for the reasons set out in paragraphs [2] and
- [3] above. It is not this court’s function to tell the Company how to run its business. As anomalous as it may sound, the issue of selection criteria (as contemplated by section 189(7) of the LRA) does not apply to the present dispute because Ms Van Haght occupied a “one of a kind” managerial position. On this score the Labour Appeal Court (LAC) in *SA Breweries (Pty) Ltd v Louw*[3] held as follows:
- [19] Axiomatically, an incumbent of a redundant post is not automatically dismissed; that person is merely dislocated and only after the opportunities to relocate that person in another suitable post have been explored and exhausted, may they be fairly dismissed.
- [20] When... several employees who occupy posts of similar function find themselves in a predicament that only some of a number of existing posts are to be retained, a selection method that is fair must be chosen to decide who is to stay and who is to go. That is the precise objective of ss 189(2)(b) and 189(7). However, as often is the case with managerial posts, the redundancy of a particular post, which is one of a kind, does not in any way trigger the need for ‘selection criteria’ in any meaningful sense. The reason is plain. No ‘selection’

for redundancy takes place when only one post is made redundant. In this matter, the post of sales manager, South Cape region, based at George is one of a kind. Of course, there are doubtless many ‘sales managers’ in other regions, but the redundancy of this post in this region is the outcome of the restructuring. The circumstances where cross-geographical bumping may fairly occur were not raised in this matter... and do not require our attention in this

judgment.

- [15] Similarly, in *Lotz v Mehleketo Resourcing (Pty) Ltd and Another*[4] this court made the following remarks: “It is undisputed... that the position of the applicant was redundant. This issue had been dealt with in November 2017 and to

consult about it again in January would have amounted to a sham. What was up for consultation was the consequences of the redundancy of the position on the continued employment of the applicant... The only practical alternatives to retrenchment were employing the applicant in a vacant position... or in a position where the applicant bumped the incumbent of a position for which he qualified”[5] (my emphasis). Neither during the retrenchment process, nor during these proceedings, did Ms Van Haght suggest that another employee

should have been retrenched as a result of her own position's redundancy (a process known as "bumping"). The section 189(3) notice explained the alternatives to dismissal considered by the Company (see paragraph [4] above), and that the Company would welcome any suggestions from Ms Van Haght on this score, but she made none. There is no evidence before me to suggest that the Company closed its mind to all possible methods of avoiding Ms Van Haght's retrenchment. In fact, the Company demonstrated a willingness to avoid her retrenchment by offering her the alternative position of HR administrator at a salary of R8000 per month. I appreciate that the offered salary may have been intolerably low from Ms Van Haght's perspective, but that does not mean that the Company acted unfairly. The fact of the matter is that the restructuring was necessary, the position of HR manager became redundant, and the position of HR administrator was the only available position. Accordingly, in my view, there was absolutely nothing unfair about the reason for Ms Van Haght's retrenchment.

[16] Regarding procedural unfairness, Ms Van Haght claims that she was not able to properly prepare for the consultation on 10 November 2022 because she had not been provided with the Company's audited financial statements. The Company declined to provide the audited statements on the basis of confidentiality, but nonetheless attempted to provide Ms Van Haght with a profit and loss report. Ms Van Haght was unable to explain why the audited statements were necessary, nor why refusing to accept the profit and loss report was justified. Consultation is a bilateral process that imposes obligations on both parties to consult in good faith in an effort to engage in a meaningful joint consensus-seeking process. [6] If Ms Van Haght had considered the profit and loss report then she may have been in a position to say that she needed more information, and also why she needed more information, and then Company would have had an obligation to address those concerns. However, in the absence of any active engagement from Ms Van Haght the Company's conduct cannot be faulted.

[17] Precious little evidence was led about what took place during the consultation on 10 November 2022. However, the section 189(3) letter is very comprehensive and I have no reason to doubt Mr Roothman when he said the following: "We did consult with [Ms Van Haght] and the other workers and, unfortunately, what is required of an employer to fairly retrench

workers, one must go through all of these points, you know, and as I mentioned earlier, I can understand from the individual's perspective that it seems like a tick box approach, but it is what is prescribed. So I don't agree that it was a mere formality. You know, Mr. Thomson and myself, we tried to go through all of the representations made by the workers... We didn't just merely make a formality of ticking the boxes". Mr Roothman's further statement that Ms Van Haght "was not very receptive to anything that we wanted to discuss with her" was not directly challenged during cross-examination, and is perfectly in keeping with her decision to not even look at the profit and loss report. Finally, it is common cause that Ms Van Haght never suggested that a further consultation meeting would be necessary, and no evidence was presented to suggest that a further consultation meeting was in fact necessary (over and above the further consultations

that took place via email). The retrenchment process followed by the Company was therefore, in my view, fair.

[18] My conclusions above demonstrate that Ms Van Haght was in fact retrenched for a fair reason and in accordance with a fair procedure.

This means that, in order to establish that the retrenchment was nonetheless unfair because it masked a true intention to dismiss

because of personal animosity, Ms Van Haght would have to show that personal animosity was the main, dominant or most proximate cause of the dismissal.[7]

[19] In *National Union of Metalworkers of SA & Others & Aveng Trident Steel (A Division of Aveng Africa (Pty) Ltd) & Another*[8] the Constitutional Court (ConCourt) was split on whether the proximate cause test was appropriate for determining the true reason

for a dismissal, or whether a probability analysis of conflicting versions was more appropriate.[9] However, given that Ms Van Haght's personal animosity claim would fail on either test, there is no need for me to decide which test is more appropriate. The vexed question of jurisdiction also does not arise because, even if she had framed her personal animosity claim as an alternative unfair dismissal dispute by invoking section 158(2)(b) of the LRA[10] (which she did not do), her claim would have failed.

[20] Ms Van Haght's allegation that all four potential retrenchees were "persona non grata" to the Company because of performance issues is not supported by any evidence. Yes, it is apparent that Ms Van Haght pushed back against Mr Thomson's decisions on the payroll issue, and on how he chose to manage her workspace. She was also unhappy about feeling (and possibly being) excluded from senior managerial decisions. I'm even prepared to accept that that both people (Mr Thomson and Ms Van Haght) found each other difficult to work with; but that does not mean that Mr Thomson falsely instituted retrenchment proceedings as a ruse to get rid of Ms Van Haght. There is no evidence to suggest that the Company could have realised the same operational desires by making different positions redundant. Certainly, there is not one jot of evidence to suggest that Mr Thomson chose to make the positions of senior project manager, site supervisor and HR manager redundant specifically because of personal animosity towards Ms Van Haght. Even if Mr Thomson did hold personal animosity towards Ms Van Haght (and this is not apparent to me), the reasons for retrenchment are so impeccable that they are, more likely than not, the proximate cause of the

dismissal.

[21] During cross-examination Mr Lawrence put it to Ms Van Haght that, if Mr Thomson really wanted to "get rid of her", why would he offer her the alternative position of HR administrator? Ms Van Haght simply, and rather meekly, said "I don't know". In my view her response is instructive. If she really believed that the retrenchment was a ruse to get rid of her, she would have said something along the lines of "Mr Thomson was taking a calculated

risk because he knew that I would never have accepted such a low salary”. But she said nothing of the kind. In fact, other than the fact that, from her perspective, she had a poor working relationship with Mr Thomson, arguments and allegations about an ulterior motive were conspicuously absent from her testimony. Finally, as if any further evidence was needed, at the time of issuing the section 189(3) notice in November 2022 the Company employed 85 people; and at the time of the hearing of this matter the Company only employed 45 people. The idea that the retrenchment was a ruse to get rid of Ms Van Haght is a fiction that, quite frankly, was not deserving of this court’s attention.

- [22] In *Letsoalo v ABSA Bank Limited*[11] I held that “The Labour Court is not a forum for employees to simply air their grievances against their employers in the hopes of settling a score; its jurisdiction is confined to assessing and applying the law. While the Labour Court is also a court of equity its equitable jurisdiction is confined to instances where the legislature has empowered it to make an equitable determination; such as the fairness or otherwise of a retrenchment. In the present matter Ms Letsoalo produced a laundry list of complaints against her employer and affected to call it unfair discrimination”. The same can be said of Ms Van Haght in this matter; she did not deal directly with the merits of her retrenchment. Instead, she produced a laundry list of grievances against her employer and affected to call it an unfair retrenchment. This resulted in the waste of precious judicial resources and should be deprecated.
- [23] Nonetheless, Ms Van Haght is correct that she was short paid during her notice period. In terms of sections 37(1)(b) and 38(1) of the Basic Conditions of Employment Act[12] (BCEA), the Company was obliged to pay her for two weeks post notice of her termination (whether or not she actually worked during this period). On the facts she was given notice on Wednesday, 16 November 2022, meaning that she should have been paid up to and including Wednesday, 30 November 2022[13] – and she was only paid up to and including Friday, 18 November
2022. The Company defended its conduct by claiming, in effect, that Ms Van Haght waived her right to the full extent of her notice pay by saying in her email of Friday, 18 November 2022 that “I would like to request immediate release of my role”. It is trite that a waiver of rights must be clear and unambiguous[14]; this email was certainly not clear and unambiguous. Ms Van Haght only explained that she wanted to stop performing her duties, and no mention is made of how stopping her duties might affect her notice pay. Sections 37 and 38 of the BCEA provide that an employer must dismiss on notice or otherwise pay the dismissed employer in lieu of notice; on the facts I cannot find that Ms Van Haght waived her rights in this respect. She is accordingly due notice pay for the period 19 to 30 November 2022.
- [24] In *Union for Police Security & Corrections Organisation v SA Custodial Management (Pty) Ltd & Others*[15] the ConCourt confirmed that costs do not normally follow the result in labour matters unless there is a compelling reason to depart from the norm (such as vexatious conduct by the parties or the bringing of a frivolous case). Although I take a dim

view of Ms Van Haght raising grievances against her employer which had nothing to do with her retrenchment, she seems to have genuinely believed that she was treated unfairly. Her claim for unfair dismissal may have been misguided, but her actions were nonetheless bona fide, and it is her bona fides (coupled with the fact that she is a vulnerable employee litigating against a corporate entity) that saves her from having to pay the Company's costs of defending this litigation.

[25] In the circumstance I make the following order:

Order

1. The applicant's dismissal was procedurally and substantively fair.
2. The respondent failed to comply with sections 37(1)(b) and 38(1) of the Basic Conditions of Employment Act 75 of 1997 by failing to pay the applicant her full two weeks' notice pay. The respondent is therefore ordered to pay the applicant the pro rata portion of her gross monthly salary of R35,000.00 for a period of 12 days representing the period 19 to 30 November 2022 (both dates inclusive).
3. There is no order as to costs.

Mark Meyerowitz

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Attorney Babalo Jiza Instructed by: Herold Gie Attorneys For the Respondent: Advocate Abubakr Lawrence Instructed by: Schoeman Law Inc

[1] 66 of 1995

[2] A covering email dated 4 November 2022 was included in the respondent's bundle, but the letter itself (apparently attached to the email) was not before this court, and neither party applied to introduce the document into evidence during the hearing.

[3]

(2018) 39 ILJ 189 (LAC)

[4] (C424/18) [2019] ZALCCT 9 (2 April 2019)

[5] At

[22] to [24]

[6] Visser v Sanlam (2001) 22 ILJ 666 (LAC) at [24]

[7] Per SA Chemical Workers Union & Others v Afrox Ltd (1999) 20 ILJ 1718 (LAC) at [32]

[8] (2021) 42 ILJ 67 (CC)

- [9] See the discussion of this decision in footnote 3 to paragraph 12 of *Securitas Specialised Services (Pty) Ltd v Kabelane* (2021) 42 ILJ 833 (LAC)
- [10] See *Securitas* (Ibid) at [14]. Cf *Mkokeli v Bloomberg LP* (2021) 42 ILJ 1224 (LC)
- [11] (JS919/21) [2024] ZALCJHB (18 July 2024)
- [12] 75 of 1997
- [13] In my view, Ms Van Haght was engaged with a normal working day on Wednesday, 16 November 2022 when she received notice of her retrenchment at 11h57. If she is to be paid the equivalent of two weeks for her notice period, that would mean two weeks after 16 November 2022 (i.e. two weeks starting from 17 November 2022).
- [14] See *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) at [81]
- [15]
- (2021) 42 ILJ 2371 (CC)
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