

SOUTH AFRICA / JUDGMENT

Van Zyl v Mutual and Federal (JS435/16) [2017] ZALCJHB 425 (15 November 2017)

[2017] ZALCJHB 425**COURT**

Labour Court Johannesburg

BEFORE

H Barnes

CASE / FILE NUMBER

JS435/16

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IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Not of interest to other judges

Case No. JS 435/16

In the matter between:

IGNATIUS PETRUS VAN ZYL Applicant And MUTUAL & FEDERAL Respondent

Heard: 13 & 14 November 2017

Delivered: 15 November 2017

BARNES AJ

Introduction

- [1] On 1 June 2013 the applicant commenced employment with iWyse, a division of the respondent, Mutual and Federal, now Old Mutual Insure (“the business”). The applicant was employed as the Claims Manager in the “Motor” division of the business. On 1 April 2016, the applicant was dismissed for operational reasons.
- [2] The applicant accepts that his dismissal was procedurally fair. He contends however that it was substantively unfair. The applicant’s dismissal occurred pursuant to the restructuring of the business as a result of which he and other affected employees were required to apply for positions on a modified organogram. The applicant’s applications were unsuccessful.

- [3] The applicant does not take issue with the need to restructure the business or with the need to retrench in general. The applicant's case, as recorded in his statement of case and in the pre-trial minute, is that his dismissal was substantively unfair because his position as Claims Manager: Motor was not affected by the restructuring.
- [4] The respondent's case is that the position of Claims Manager: Motor changed significantly as a consequence of the restructuring.
- [5] The key issue for determination before me is therefore a narrow one. It is whether the position of Claims Manager: Motor held by the applicant prior to restructuring remained unchanged after restructuring.
- [6] The applicant did not plead, in the alternative, that if the position of Claims Manager: Motor did change after restructuring, he ought to have been appointed in the position. Notwithstanding this, the parties canvassed this issue in the evidence and I will accordingly consider it in my judgment.

The Evidence

The Evidence for the Respondent: Mr Wilken

- [7] The respondent led the evidence of Mr Johannes Wilken. His partnership, 360troy Partnership ("360troy"), was engaged by Old Mutual Direct Holdings in 2016 to develop a turnaround strategy for the business. This was necessary because the business had suffered a R150 million underwriting loss in the previous financial year and had suffered losses prior to that as well. The financial situation of the business was disastrous and the situation was considered to be unsustainable.
- [8] The brief to 360troy was to develop a strategy to deliver the financial turnaround of the business while saving as many jobs as possible. To this end, 360troy presented a restructuring strategy to the boards of the respondent and Old Mutual Direct Holdings. The restructuring strategy was approved.
- [9] Mr Wilken testified that it was found that there were operational inefficiencies in the business, a lack of appropriate skill at many levels and that the business was being poorly managed. The restructuring strategy sought to address this appropriately at all levels of the business.
- [10] As far as the business's Claims Department was concerned, Mr Wilken testified that the 2016 statistics revealed that only 15% of claims received were being repudiated. This was significantly below the industry benchmark of 25%. There was therefore a concern that the Claims Department was paying out significantly more claims than ought to have been the case.
- [11] The Claims Department was comprised of two divisions: "Motor" and "Non-Motor." In the "Motor" division, there was a separation between the "call centre" function which handled the registration and processing of claims and the investigation function which handled the

investigation of claims. As Claims Manager: Motor, the applicant was responsible for the call centre function only. There was an Investigations Manager who was responsible for the investigation function. The Investigations Manager reported not to the applicant but to the applicant's superior.

- [12] The "Non-Motor" division operated differently in that the call centre function and investigation function were managed in parallel by the Claims Manager: Non Motor.
- [13] Mr Wilken testified that having regard to the low claim repudiation rate, it was considered necessary to bring the investigation skill set closer to the call centre in the Motor division. This would assist in ensuring that claims were scrutinised from a merit perspective at an earlier stage and minimise the risk of bogus or unmeritorious claims being paid out.
- [14] A decision was therefore taken to do away with the post of Investigations Manager in the Motor division and combine the call centre and investigation functions under the management of Claims Manager: Motor (as was the case in the Non-Motor division).
- [15] The organogram was altered accordingly and affected employees, including the applicant were invited to apply for positions on the new organogram.
- [16] The applicant applied for three positions: Claims Manager: Motor; Claims Manager: Non Motor and Claims Manager Admin Support. The applicant indicated that his preferred position was Claims Manager: Motor.
- [17] Mr Wilken was a member of the interview panel. He testified that the applicant was found not to be suitable for any of the positions applied for. In relation to the positions of Claims Manager: Motor and Claims Manager: Non-Motor the reason was that the applicant lacked sufficient investigative experience. Mr Wilken testified that while the applicant had, during his three years of employment with the business, referred claims for investigation, he had no experience of personally conducting or managing investigations. By contrast, Mr Reinhardt Smit ("Mr Smit") who was appointed as Claims Manager: Motor had 22 years of investigative experience. Ms Ursula Barnard ("Ms Barnard") who was appointed as Claims Manager: Non Motor had 20 years of investigative experience.
- [18] In relation to the post of Claims Manager: Admin Support, Mr Wilken testified that the incumbent at the time of restructuring, Mr Charl Fick ("Mr Fick"), had significantly more experience in the short term insurance industry than the applicant and had been performing very well in the post. For these reasons, it was considered preferable to retain Mr Fick in the post.
- [19] Mr Wilken's above evidence was not challenged during cross examination.
- [20] It was put to Mr Wilken during cross examination that nothing in the job description for the position of Claims Manager: Motor (post restructuring) referred to the need to conduct or manage investigations. Mr Wilken replied that this was incorrect and read the description of the purpose of this post which provided as follows:

“To effectively manage the designated Motor/Non Motor Claims area (consisting of claims consultants and investigations) and ensure containment of claims spend and provide excellent service in setting a culture of best practice within mandated responsibility.” (emphasis added)

- [21] It was also put to Mr Wilken during cross examination that after the applicant’s dismissal a new Investigation Team Leader was employed in the Motor division. Mr Wilken confirmed this but stated that this did not alter the new managerial role ascribed to the position of Claims Manager: Motor post restructuring.

The Evidence for the Applicant: Mr Van Zyl

- [22] The applicant testified that he had a long history in the insurance industry commencing in 1994. He had been employed by Sanlam Life Assurance, Discovery Insure, Fedsure Health, Liberty Health and Destiny Health. He had occupied a management position in all the above businesses and therefore had over 20 years of managerial experience.
- [23] The applicant confirmed that the above businesses dealt with health and long term insurance and that his only experience in the short term insurance industry was his three years in the iWyse business.
- [24] The applicant testified that as the Claims Manager: Motor, he had, prior to the restructuring, 45 staff members and 5 team leaders who reported to him.
- [25] The applicant further testified that he has been unemployed since his retrenchment.
- [26] Under cross examination, the applicant confirmed that prior to the restructuring the Investigation Manager in the Motor division did not report to him but to his superior. He confirmed further that pursuant to the restructuring, the post of Investigation Manager was done away with and the investigation function combined with the call centre function under the management of the Claims Manager: Motor.
- [27] The applicant sought to emphasise the fact that the Claims Manager: Motor (post restructuring) was not required to personally conduct investigations. He accepted however that the incumbent was required to oversee investigations and would be expected to be able to step in and assist in high profile or complex investigations. He accepted, under cross examination, that investigative experience was therefore required.
- [28] Under cross examination, the applicant conceded that Mr Smit and Ms Barnard were properly and appropriately appointed to the positions of Claims Manager: Motor and Claims Manager: Non Motor, respectively, regard being had to their investigative experience.
- [29] Other than to state that he considered Mr Fick to be immature, the applicant did not give any reason why he should have been appointed to the position of Claims Manager: Admin over Mr Fick.

Analysis

- [30] It is clear from the evidence that the applicant's contention that his position of Claims Manager: Motor did not change as a result of the restructuring cannot be sustained. The position changed significantly in that it incorporated management of the investigative function which had previously been managed separately. The applicant conceded this under cross examination.
- [31] As stated above, the applicant's pleaded case was confined to the contention that his retrenchment was substantively unfair because his position was not affected by the restructuring. He did not plead in the alternative, that even if the position did change, he was the most suitable candidate. The evidence having established that the position did change, significantly at that, the applicant's case must be found to be without merit.
- [32] Even however if the Court were to go on and consider the appointments made, I am satisfied that the respondent established that it had fair and rational reasons for making the appointments it did. Moreover, the applicant did not lead evidence to the effect that he was the most suitable candidate for any of the positions applied for and in fact conceded, under cross examination, that the appointments were properly and appropriately made.
- [33] The respondent sought the costs of the action, if successful. The applicant has however been unemployed since his retrenchment and I do not consider it fair in the circumstances to award costs against him.
- [34] I therefore make the following order:

Order

1. The action is dismissed.
2. There is no order as to costs.

H BARNES

Acting Judge of the Labour Court

Appearances:

For the Applicant: Adv Koetle

Instructed by:

Charmain Gibbens Attorneys

For the Respondent: Mr R Orton (Snyman Attorneys)

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