IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case No: J2609/99

Applicant

and

TILE AFRIKA BOKSBURG (PTY) LTD

Respondent

JUDGEMENT

Bruinders,AJ

During October 1998, Pieter Grobler (Grobler) was employed as a salesman at respondent's branch in Boksburg. He was appointed in that position by Martin van den Berg (van den Berg) who was the manager at Boksburg and a personal friend. On 20 December 1998, van den Berg married Grobler's sister Sulet, after the two had eloped, much to the chagrin of Grobler's father. The latter felt that he had lost a daughter, that van den Berg was the cause of that loss and as a result, disowned Sulet and wanted nothing to do with the newlywed couple.

Back at the branch, Grobler worked under van den Berg's supervision, now not only as friend but also as brother-in-law. On 11 January 1999 respondent required Grobler to sign a written employment contract and to transfer to another branch because of its policy against the employment of two or more family members at the same branch. This was the first time that Grobler became aware of the policy. He refused to comply with both requirements. As a result he was suspended, disciplinary

proceedings were instituted against him and he was required to attend a disciplinary hearing to answer three charges, including the charge of being disrespectful to management by refusing to comply with company policy.

The disciplinary hearing was chaired by Norman Seaber ('Seaber') of the General and Domestic Employers' Organization, who advises respondent on labour disputes. It was held on 18 January 1998. Seaber acquitted Grobler of all the charges. Seaber was of the view that the charge relating to Grobler's refusal to sign the employment contract resulted from confusion and a breakdown of communication. At the request of the respondent, Seaber held a meeting with Grobler and Cloete on 20 January 1999, so as to resolve the impasse flowing from the refusal to sign the employment contract and the refusal to transfer from Boksburg.

It is undisputed that at that meeting two options were put to Grobler. They are recorded in a summary minute of that discussion kept by Seaber, which records the following:

"The resolution to the problems were offered:-

n 1: We would accept that the probationary period was complete.
The basic gross salary would be increased by R60.00 per month to cover the extra petrol used.
Pieter would accept the position in Ormonde/Randburg or Alberton once the store is opened. He would immediately be placed in one of the alternate stores.

n 2: Because of the confusion created:-
Should Pieter feel that he cannot accept the option 1, we would be willing to offer a settlement of 2 (two) months pay and we would part ways by mutual agreement.
A certificate of service and settlement letter would be given to Pieter.

A deadline of Thursday 21 January 1999, 12:00 has been given to Pieter giving him time to decide on the options.

Pieter remains on paid suspension until such time."

After being put on terms, Grobler sought advice from JW Borman, a labour relations consultant and a family friend. On 21 January 1999, Borman wrote to the respondent

under cover of a letter from The IR Workshop, the third paragraph of which reads as follows:

"We request full particulars of the offers made to our client regarding the possible transfer or the termination of his services with a severance package. We request this information to be forwarded to us before the close of business today, in order for us the (sic) consult and advise our client accordingly."

On the same day and in response to Borman's letter, respondent wrote to Grobler. The body of that letter reads as follows:

"We have had a communication for (sic) the IR Workshop requesting us to communicate with them in terms of the proposals we have put to you.

It is our policy that we do not allow external representation with us directly in terms of any internal problems that are in the process of being resolved.

We must record that we have fully investigated the conflict situation that developed. All of your queries have been explained and the company has made certain proposals, and in particular generated two options.

We remain concerned that this matter has been blown out of all proportion, particularly in that management have received telephone calls from a Mrs Bornman and your father of a demanding nature which only serves to break down the employment relationship we had hoped would develop into a future with Tile Afrika.
We again advise you that this situation cannot carry on and we need a decision from you in relation to the options, by no later than the close of business today.

Should you decide to take no decision, you need to clearly understand that we cannot allow a situation to continue three (sic) you refuse to accept the prevailing employment conditions nor to tender your services at another branch of your choice (three branch options provided to you).

If this is the case, and you do not wish to accept the employment conditions, then we shall have no alternative but to consider that you will have decided thereby not to work under these conditions, the consequence of which will be that you will repudiate your employment with Tile Afrika.

We sincerely hope this is not the case, but require a decision by close of business today when your paid suspension will accordingly end and when either of the following will apply:

1 Tender your services and be advised where to resume your duties;
2 Take up the option of your service being terminated by mutual agreement with an

exgratia payment to your of two month's salary in full and final settlement (notice not applying).

3 Your repudiation of the employment contract."

Borman responded by letter dated 21 January 1999, the relevant paragraphs of which read as follows:

"8 The refusal by our client to accept any of the your (sic) offers or the refusal to accept revised conditions of employment can never amount to the repudiation of our client's employment contract.

9 Our client tenders his services in terms of his original contract of employment at the Boksburg branch and will be reporting for duty on 22 January 1999.

10 Your actions are rendering continued employment of our client intolerable and you are urged to cease these unfair employment practices immediately.

11 Our client is prepared to enter into bona fide negotiations on a without prejudice basis to terminate his employment contract on terms and conditions acceptable to him.

12 Our client has the right to consult his parents as well as any person of his choice to obtain the necessary advice. In terms of Section 189(1)(d) of the Labour Relations Act, our client had mandated ourselves as his representative, if you wish to dismiss our client based on your operational requirements.

13 Any unilateral change in working conditions or unfair dismissal will be opposed by our client."

On 22 January 1999, respondent despatched a letter to Grobler. In that letter, respondent purported to give formal notice that it was contemplating termination of his employment on account of operational requirements or by mutual consent, in terms of the option given in previous discussions and correspondence. The letter also recorded that Borman and Seaber would set up a meeting.

A meeting was held on 25 January 1999, attended by Borman and Seaber as well as their principals in the form of Grobler and Cloete on behalf of respondent. The proposal embodying the two options recorded in Seaber's minute were repeated. The

transfer option was improved by respondent offering an increased travel allowance and Grobler's retention of his profit share in the Boksburg branch, regardless of the branch he transferred to. The alleged family feud and its impact on the branch at Boksburg was discussed. Although Grobler never testified at the trial, the evidence was that van den Berg and Grobler had agreed between themselves not to allow the feud between the newlyweds and Grobler senior to affect their relationship at work. During the discussion Seaber asked Borman whether the employment relationship was capable of continuation. Borman said it had broken down, he used words to the effect that 'die vertrouens verhouding het verbrokkel'. Both Seaber and Borman agreed that the trust relationship had broken down. It was clear that Grobler did not want to continue to work for the respondent regardless of the branch he worked in. The only option for debate between the parties was the second, namely the settlement offer of two months' salary. Both parties took time to caucus. After caucusing, respondent was informed that its offer was rejected. The parties could not settle on Grobler's monetary demand and the meeting came to an end.

On the following morning respondent informed Grobler by letter dated 25 January 1999 that his employment contract was terminated because of his unreasonable refusal to accept alternative employment. Grobler claims that his dismissal was unfair because respondent failed to comply with the provisions of s189 of the Labour Relations Act 66 of 1995 ('the
Act') and because there was no valid reason for his dismissal.

I must decide whether respondent has complied with s189 of the Act and whether the dismissal was substantively fair.

Respondent did not comply with the requirements of s189(3) in particular because it did not set out in writing those matters required to be set out in writing and, in so doing, failed to comply with a self standing duty imposed upon it by the Act. [*Sikhosana v Sasol Synthetic Fuels (2000) 21 ILJ 649 (LC) at 654*] But I am cautioned against the use of a mechanical checklist approach [*Johnson & Johnson (Pty) Ltd v*

Chemical Workers Industrial Union (*1999) 20 ILJ 89 (LAC) at 97-8*] As will appear later in my judgement, at the meeting of 25 January 1999 , respondent sought to achieve the ultimate object of s189(2), namely, a joint consensus seeking process. It certainly initiated the consultation process on 20 January 1999, when Seaber discussed with Grobler the reasons for the transfer and made the offer of alternative employment. It allowed him an opportunity at that meeting and at the meeting of 25 January 1999 to make representations about the matters discussed. He had an opportunity to make counter-proposals and did. He did not want to transfer in accordance with the alternatives offered. He considered the trust relationship to have broken down and wanted to terminate his employment contract but he wanted more money than was offered. Despite respondent's non-compliance with s189(3), these factors and the fact that Grobler had only worked at respondent for three months, result in my exercising the discretion given to me by s193(1)(c) of the Act, in favour of respondent by not awarding any compensation for procedural unfairness. [*Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial* Union, *supra]*

Respondent contends that Grobler's dismissal was substantively fair because he was dismissed after unreasonably refusing to accept a transfer, in effect, an alternative offer of employment. The reason for the transfer was respondent's policy against the employment of two or more family members at the same branch. It was conceded by van den Berg, who testified on behalf of Grobler, that the policy was reasonable and he explained why he felt it was reasonable. He conceded that there was a feud between him and Grobler's father, Grobler still lived at home and that it was reasonable for respondent to be concerned about discipline and his ability to maintain it at the Boksburg branch, although the feud had not affected his working relationship with Grobler.

Having made the concession that the policy was reasonable and then failing to call any evidence to challenge the policy, I may not go behind the policy to second-guess its commercial or business efficacy. If reliance by respondent on the policy was a sham and not genuine then, of course I am at liberty to find that such reliance and

the subsequent dismissal are substantively unfair. [*SA Clothing & Textile Workers Union v Discreto* - A *Division of Trump & Springbok Holdings (1998) 19 ILJ 1451 (LAC) at 1230G*] Although van den Berg suggested that respondent had an ulterior motive in requiring Grobler to transfer, I am unable to find any facts or probabilities supporting that suggestion. It was clear from the time that Grobler was asked to transfer, shortly after van den Berg married his sister, that respondent required him to transfer because of the policy and because of its not unreasonable fear that the feud between van den Berg and Grobler's father could spill over into the work-place.

In considering the substantive fairness of the dismissal, the following principles are apposite: employees who unreasonably refuse an offer of alternative employment forfeit their right to receive a severance package; [*Sayles v Tartan Steel CC (1999) 20 ILJ 1290* (*LC) at 653-4*] a dismissal of employees who unreasonably refuse an offer of alternative employment is not substantively unfair; [*Lebowa Platinum Mines Ltd v Hill (1998) 19 ILJ 1112 (LAC) at 1130C*] it would be unreasonable to refuse to accept an alternative offer of employment where remuneration, job security and status remain unchanged. [*Sayles v Tartan Steel CC, supra, at 653*]

I am satisfied that the alternative offered was not unreasonable. Grobler was offered the same job on the same terms and conditions initially. This offer was bettered by the respondent: Grobler's petrol allowance was increased and he retained his profit share in the Boksburg branch which was more profitable than the three alternative branches. The only change was that he was required to work at a different branch. He was given a choice of three branches. His remuneration, job security and status remained intact. In addition he was offered the alternative of a monetary settlement if he did not want to accept the alternative employment offered.

Grobler's reason for refusing the offer of alternative employment had nothing to do with any perceived drawbacks associated with the alternatives. He considered the employment relationship to have broken down. He did not want to work for the respondent. Borman said that Grobler's sole purpose at the meeting was to negotiate

a termination of his employment contract. He rejected the first option of a transfer to another branch and elected to negotiate around the second option, namely the monetary settlement. Instead of accepting the second option,ie. the settlement offer of two months' salary, he sought to demand and negotiate for more money. He failed to obtain his demand and, in refusing to accept the alternative employment offered, he ran the risk of dismissal, which was the reason given for his dismissal in his termination notice.

Borman's insistence during evidence that the meeting of 25 January 1999 was not a consultation as envisaged by s189 of the Act, is not supported by the evidence or the probabilities. The summary minute records that on 20 January 1999, Grobler was informed of the requirement that he transfer, the reason for the requirement and that the offer of alternative employment or a monetary settlement was made. In his first letter of 21 January 1999, Borman was aware of the alternative offered and requested particulars about the termination of Grobler's employment with a severance package. Respondent repeated the offer of alternative employment, and the reason, in its letter of 21 January 1999. In his second letter of 21 January 1999, Borman recorded that he was mandated in terms of s189(1)(d) of the Act to represent Grobler if respondent wanted to dismiss him for operational requirements. In its letter of 22 January 1999, respondent gave notice that it considered dismissing him for 'operational requirements and/or by mutual agreement, in terms of the option we gave you in our previous discussions and correspondence'. There was at least one telephone conversation between Borman and Seaber during which the latter testified that he arranged the meeting and informed him that respondent wanted to talk at the meeting about termination for operational reasons.

Seaber testified that at the meeting itself, the options were put to Grobler in the context of its operational requirement, namely its policy prohibiting the employment of two or more family members at the same branch as well as the potentially damaging nature of the family feud. Borman conceded that he discussed the family feud and its impact upon the Boksburg branch. It is unlikely in these circumstances

that respondent did not attempt to consult with Grobler so as to achieve the objects of s189 of the Act, namely ,in this instance, to attempt to persuade him to accept the alternative offer of employment. In the circumstances I find that the dismissal was not substantively unfair.

I am not persuaded that costs should follow the result, as suggested by Mr du Plessis for Grobler, or that the application was frivolous and vexatious, as suggested by Mr van Rensburg for respondent. The award of costs is a discretionary matter and in exercising my discretion against awarding costs to respondent, I take into account that the dismissal did not comply with s189(3) as well as the fact that the dismissal was substantively fair.

In the result the application is dismissed, no order as to costs.

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T J Bruinders

Acting Judge of the Labour Court

30, 31 January 2001

1 February 2001

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