IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: JR953/07

In the matter between:

FOURIE SIBUSISO MOTAUNG	**Applicant**
And	
KWIKSPACE MODULAR	
BUILDINGS (PTY) LIMITED	**1ST Respondent**
THE COMMISSION FOR CONCILIATION,	
MEDIATION AND ARBITRATION (CCMA)	**2ND Respondent**
TIMOTHY BOYCE N.O	**3RD Respondent**

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application to review and set aside the arbitration award issued under case number GAJB 2650– 06, dated 2nd March 2007. In terms of

the arbitration award the third respondent, the commissioner found the dismissal of the applicant for operational reasons to be both procedural and substantive fair.

Background facts

[2] The applicant was initially employed by the first respondent during May, 2000 as a store-man. He was during July 2001, promoted to the position of assistant buyer. His duties as an assistant buyer included amongst others requesting quotations for different materials required to various suppliers and evaluating this quotations to establish whether they are reasonable. At this stage the applicant's supervisor was Mr Mackenzi who passed away during August, 2002.

[3] It is apparent that the applicant expected to take over from Mackenzi not only because the position became available but also because he always acted in the position whenever his supervisor was a way. The expectations of the applicant were not realized because Mr Fourie was appointed into the position soon after the death of Mackenzi. The position was according to the applicant not advertised when Fourie was called back from retirement.

[4] The applicant was clearly dissatisfied with the turn of events and accordingly lodged a grievance against the step taken by the applicant to fill in the vacant post. It would appear that as a result of the grievance the employment of Fourie was terminated and Mr Nel of the human resource department was appointed.

[5] The applicant complained that Nel did not have experience or any qualification as a buyer. The applicant, at this stage worked as an assistant buyer. Nel resigned during February, 2006 and Mr. Brink was appointed as an acting senior buyer. The applicant complained again that the appointment was made without advertising the position.

[6] The applicant initially wrote a letter complaining about his treatment and when no response was forthcoming he then filed another grievance. He indicated to Mr Ackerman, the managing director that he believed that he was qualified to act in the position of the senior buyer. He also requested reasons why he was not considered for the acting appointment.

[7] The outcome of the grievance hearing was that the respondent would follow its policy in the appointment of a senior buyer. This outcome was

according to the applicant not implemented as Mr Brink was still acting as a senior buyer by the 11 May 2006. In following up the matter the applicant wrote another letter requesting reasons why Brink was acting as a senior buyer. As the position was still not advertised by the 10 July 2006, the applicant wrote another letter to the applicant enquiring about the cause of the delay.

[8] The position was advertised on 13 July 2006 and thereafter the applicant was invited to an interview on 10 August 2006. The applicant was unsuccessful but was offered a position as a buyer. The applicant rejected the offer and requested the reasons for the non appointment.

[9] The reasons for the non appointment was furnished in the letter dated 6th October 2006, wherein Fourie confirmed the discussion he had with the applicant and stated the reasons for the applicant's unsuccessful application as being his lack of management competencies including purchasing management experience, stores control management experience, management experience that included industrial relations, supplier contract negotiations and health and safety, general cost control and financial management.

[10] In the same letter Fourie further indicated that due to business development the purchasing department was re-structured to accommodate the increased pressure on the purchasing department.

[11] On the 6 October 2006, the respondent addressed a letter to the applicant in which it noted that he had rejected the offer to appoint him as a buyer and further placed on record the discussions that the applicant had with Ackerman in particular the intention to restructure the purchasing department to improve the functioning thereof. The applicant was also informed that his position has as a result of the new structure fallen away and was replaced by the senior position of a buyer. The applicant respondent in an undated letter where he confirmed that he had rejected the offer of the position of buyer. The relevant part of the letter reads as follows:

> "*On 07 September Mr. Ackerman approached me, and offered me the position of Buyer, which was not advertised, and I did not apply for, and also informed me that my application for the position of Purchasing Manager was unsuccessful. I declined the offer, and asked Mr. Ackerman to provide me with written reasons why I did not get the position of Purchasing Manager, but he did*

not do so."

[12] On 24 October 2006, the respondent addressed a letter to the applicant in which it advised the applicant as follows:

"*Dear Fourie*

RE: RETRENCHMENT/ REDUNDENCY

I refer to your letter dated 20 October 2006, in response to our communication dated 18 October 2006.

I also refer to your discussion with Mr. Van den Berg on 20 October 2006, in which you have confirmed that you do not accept the offer for the position of Buyer, for the reasons stipulated in your letter. You have confirmed your decision, notwithstanding the fact that it was explained to you previously that the recruitment procedure does not require advertising of positions in case of a restructuring.

You have been informed previously that the position of Assistant Buyer is redundant due to the restructuring in the department, and as you have confirmed that you do not wish to accept the alternative position of Buyer, you are directly affected.

You are accordingly invited to attend a consultation meeting in terms of Section 189 LRA to consult with you on issues including:

1. *The reasons for the possible retrenchment and alternatives thereto*
2. *The timetable if retrenchment is unavoidable*
3. *If retrenchment is unavoidable, the benefits and assistance including severance pay if applicable*
4. *Assistance in the process*

The meeting will be held on Thursday, 26 October, 2006 at 08h30 in the Kwikspace boardroom.

Yours sincerely"

[13] The applicant responded to the above letter and stated the following :

"*Dear Sir*

ATTENTON: MR. JOHAN ACKERMAN

Your letter dated 24 October2006, which I received on the morning of 20th of October 2006, refers.

I wish to respond to your offer as follows:

1. *The discussion I had Mr. van der Berg on 24 October, 2006, at 12h30, and not 20 October 2006, as your above letter suggests.*

2. *I emphatically deny that I ever told Mr. van der Berg that I do not want the position of Buyer, and refer to various correspondents to yourself about this issue where I never stated that I do not want the position.*
3. *If indeed I did not want the position of Buyer I would have categorically stated so in my correspondence to you, and therefore do not want your Mr. van der Berg to only suggest that I said so.*
4. *The dispute I have with the company is about challenging the reasons why I was not appointed to the position of Purchasing Manager, which I refer to the CCMA.*
5. *It would appear that the issue of restructuring is an attempt to deviate from the actual dispute and cloud the issues, and I am going to argue this point at the CCMA.*
6. *I, therefore, request that the issue of consultation be attended to after the CCMA had disposed of the dispute.*
7. *I reserve the right to respond to your entire letter at the appropriate time, but this should not be*

interpreted as an admission of its contents.

Yours faithfully."

[14] The consultation meeting between the parties was held on 26 October 2006. Initially the applicant requested the postponement of the meeting but after discussions it was agreed that the meeting would continue and that the respondent would put its proposal on the table without requesting the applicant to respond thereto. The applicant was however, afforded the opportunity to ask questions of clarity. The minutes of this meeting indicate that the applicant confirmed his rejection of the offer of the position of buyer.

[15] The applicant responded to the contents of the minutes in a letter dated 30 October 2006, wherein he stated the following:

"I have noted the contents of the minutes of the above consultation meeting, but do not agree with them. I need to point out that I have never refused to accept the position of Buyer, unless you provide correspondence from me where I categorically stated so. On this basis, it is not fair and correct to state that the position "has been dealt with and is rejected by the employee." As an alternative to retrenchment, I am accepting the position of Buyer. Should you for some reason proceed to retrench me, it would be

unfair not to pay me severance pay. I have not had sufficient time to find a representative as you only brought the issue after the consultation had commenced, and therefore request sufficient time to find one."

[16] The offer to the applicant for the position of buyer was discussed again at the meeting held on 31 October 2006. The applicant indicated that before he could accept the position he needed to see its job description. When the respondent indicated that the position of the buyer would entail more responsibility, the applicant indicated that he was not prepared to accept the position of buyer and that he would rather be retrenched.

[17] On 31st October 2006, the respondent issued the applicant with the retrenchment notice in which the applicant was advised that his employment would be terminated on the 30 November 2006. Thereafter, the applicant referred an alleged unfair dismissal dispute to the second respondent (the CCMA).

Grounds for review and the ward

[18] The applicant in his founding affidavit raises six grounds of review.

[19] The first ground of review is the complaint that the respondent was represented by an attorney whereas the applicant was not. In this regard the applicant complains that he was not offered an opportunity to obtain the services of an attorney nor was the matter postponed to afford him an opportunity to seek the assistance of an attorney.

[20] The second ground concerns the allegation that the commissioner was biased in that he intervened whenever the applicant asked questions to the respondent's witnesses.

[21] The third ground concerns the allegation that the commissioner accepted the version of Ackerman regarding the meetings he alleged to have held with the applicant, despite denials of such meetings.

[22] The fourth ground is that the commissioner failed to take into account failure by the respondent to explain why the position of the applicant had become redundant.

[23] The sixth ground is that the commissioner failed to take into account

the fact that the applicant was required to sign a letter of appointment for a position he (the applicant) was not informed what it entailed.

[24] The commissioner found that the respondent held three consultation meetings with the applicant and at the third meeting which was attended also by the managing director of the applicant, Ackerman, the applicant was informed that he could still accept the position of buyer which was previously offered to him.

[25] In his analysis of the evidence and argument the commissioner found that the applicant was aware of the restructuring of the purchasing department well in advance and prior to his position being declared redundant. The commissioner further found that the applicant rejected the position of a buyer, which was according to him a promotion, despite it being repeatedly offered to him.

[26] I now proceed to deal with the criticism raised by the applicants against the award of the commissioner.

Legal representation

[27] Legal representation at the CCMA was prior to the 2002 amendments regulated by sections 135 (4), 138 (4) and 140 (1) of the LRA. The 2002 amendments repealed all these sections and the CCMA was given the power to make rules regulating the right of any person or category of persons to represent any party in any conciliation or arbitration proceedings in terms of s115 (2A) (k). The CCMA in exercising the powers given to it by s115 (2A) (k) of the LRA made regulations which were published during April 2004. Rule 25 provides:

> "*In any arbitration proceedings, a party to a dispute may be appear in person or be represented only by:*
>
> *(1) A legal practitioner,*
>
> *(2) A director or employee of the party and in the Close Corporation a member thereof, or*
>
> *(3) Any member, office bearer or official of that party registered trade union or a registered employer's organisation.*

[28] The important part for the purposes of the present case is rule 25 (c) which reads as follows:

> *"If the dispute being arbitrated is about fairness of dismissal and the party has alleged that the reason for the dismissal relates to*

the employees' conduct or capacity, the parties, despite sub rule (1) (b), are not entitled to be represented by a legal practitioner unless-

1. *"The commissioner and all the other parties consent*;
2. *The commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation without consideration-*
    a) *The nature of the question of law raised by the dispute;*
    b) *The complexity of the dispute;*
    c) *The public interest and*
    d) *The comparative ability of the opposing parties or their representative to deal with the dispute".*

[29] It is apparent from the above that as a general rule parties are not entitled to legal representation in the CCMA if the dispute to be considered concerns the dismissal for misconduct or incapacity. In all other disputes the parties are entitled to legal representation including as was the case in the present matter dismissal for operational requirements.

Commissioner's bias

[30] As indicated above the applicant complained that the commissioner was

biased because he intervened every time the applicant asked questions to the respondent witnesses.

[31] In terms of s1358 of the LRA the commissioner has the power to conduct the arbitration hearing in a manner that he or she considered appropriate in order to determine the dispute fairly and quickly but must deal with the substantial merits of the dispute with the minimal legal formalities.

[32] The perusal of the record does not reveal any unfairness in the manner in which the commissioner conducted the arbitration proceedings. There are indeed instances in the record that indicates the commissioner intervening during cross examination by the applicant. This intervention however was clearly for the purpose of assisting and directing the applicant to focus on the issues that were before the commissioner. The commissioner cannot be faulted for adopting the approach he did because by doing so he was exercising the powers given to him by s138 of the LRA and he did so in a fair manner.

Dismissal and Consultation

[33] The provisions of s185 of the LRA, provides general protection to employees from unfair dismissal. A dismissal of an employee is regarded as being unfair in terms Section 188 of the LRA if an employer fails to prove that:

"(a) That the reason for the dismissal is for a fair reason

i) . .

ii) Based on the employer's operational requirements and;

b) That the dismissal was effected in accordance with fair procedure.

[34] In terms of s189 (1) of the LRA an employer is required to consult with employees or their representatives when it contemplates a dismissal because of operational requirements. In the consultation process both the employer and employees or their representatives are required to seek consensus on the appropriate measures to avoid and to mitigate the adverse effect of dismissals due to operational reasons.

[35] In the consultation process the employee also has a duty to corporate with the employer with the view to seeking a solution to either avoid the retrenchment or minimize its impact. There is an established principle that the law will not come to the assistance of an employee who is uncooperative and frustrates the consultation process.

[36] The test for review as enunciated in **Z Sidumo and Another v Rustenburg Platinum Mines Limited and Others (2007) 12 BLLR**

1097, is that of a reasonable decision -maker. The test entails an enquiry as to whether or not the decision of the commissioner of the CCMA is one which a reasonable decision–maker could not reach. In terms of this test the court is entitled to interfere with the decision of the commissioner only if it finds that the decision reached by the commissioner is one which a reasonable decision-maker could not reach.

[37] In the present instance the commissioner correctly found, based on the evidence before him that the employee was uncooperative and unreasonable in rejecting the position of a buyer which was in fact a promotion. In my view the award cannot be said to be unreasonable when regard is had to all the circumstances of this case and the material which was placed before the commissioner. It is not for this court to determine whether the decision of the commissioner was correct or not. The role of this court is to determine whether or not the decision was reasonable. Thus, there is no basis for this court to interfere with the decision of the commissioner and accordingly the application to review and set aside the decision of the third respondent stands to be dismissed.

[38] It seems to me that it would not be unfair to order costs to follow the

results.

[39] In the premises, the following order is made:

1. The application is dismissed.

2. There is no order as t costs.

MOLAHLEHI J

DATE OF HEARING **:** 05 DECEMBER 2007

DATE OF JUDGMENT **:** 17 JUNE 2008

APPEARANCES

For the Applicant : SIBUSISO MOTAUNG (IN PERSON)

For the Respondent: Mr DIRK COETSEE (Attorney)

Instructed by : DIRK COETSEE ATTORNEYS