IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JS 380/08

In the matter between:

SASBO obo DOUGLAS LOUIS BOUGHEY APPLICANT

AND

NEDBANK LIMITED RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] The applicant in this matter seeks an order directing the respondent to reinstate him in the position he occupied prior to his dismissal for operational reasons by the respondent. The position he occupied was that of the area manager.

[2] The applicant has also applied for condonation for the late referral of the statement of case to the court. In essence the delay was caused by the initial referral to arbitration of the dispute to the Commission for Conciliation Mediation and Arbitration (CCMA), after attempts at reaching consensus failed at conciliation. Based on the explanation tendered and the prospects of success, there is no reason, in my view, for not granting condonation for the late referral of the statement of case.

Background facts

[3] At the time of his dismissal, the applicant was employed by the respondent as the Area Manager Sales for the Central Region earning a salary of R424.408 per annum

[4] The case of the applicant as set out in the statement of case is that he was invited to attend a meeting by the respondent on the 6th October 2006, to discuss charges relating to his ability to manage staff that fell under his supervision in including his suitability as the area manager sales.

[5] The notice convening the above meeting indicated that the respondent would recommend that he should accept demotion from the position as area sales manager to the position of business manager. The temporary nature of the demotion would depend on further training and or intervention by senior management.

[6] After several postponements, the meeting finally convened at the beginning of November 2006. It was indicated again at this meeting that the purpose of the meeting was to discuss the improvement of staff relationship with the applicant. According to the applicant, he was informed at that meeting that to accept the demotion otherwise his position would be made redundant and would also not qualify for alternative positions in the bank. He was further told that refusal to accept the demotion would disqualify him for severance package. The demotion was offered at the same salary as that which the applicant was earning at the time.

[7] At the meeting held on the 13th November 2006, the applicant was informed that he would be appointed to the position of business management as from the 22nd November 2006. This was then confirmed in a letter dated the 15th November 2006.

[8] On the 22nd November 2006 the applicant's attorneys addressed a letter to the respondent wherein several issues concerning the demotion of the applicant was raised. Two days thereafter the applicant received a letter from the respondent advising him that it was contemplated that he would be retrenched. The reasons for the retrenchment is set out in a letter dated 24th November 2006 which reads as follows:

> *"NOTICE OF INTENDED RETRENCHMENT: NOTIFICATION IN TERMS* SECTION *189 (3) OF THE LABOUR RELATIONS ACT NO 66 OF 1995 (THE LRA)*
>
> *1. This is a notice in terms of provisions of Section 189 (3) of the LRA, No 66 of 1995 ("the Act").*
>
> *2. Due to a sequence of events, as per hour previous communication with you, we are obliged to inform you that Ned Bank Ltd is presently contemplating your retrenchment.*
>
> *The need to consider your retrenchment has been necessitated by:*
>
> *a. the efforts by the bank to address your suitability as Area Sales Manager*

b. your refusal to consider the Business Manager role

c. no further proposals made by yourself around other suitable alternatives

d. a seemingly unresponsive stuns by yourself in the bank's attempts to consult with you in this regard"

[9] The applicant then referred the dispute to the CCMA, and its conciliation having failed, mistakenly referred it to arbitration. It was only after the ruling by the commissioner regarding the CCMA's jurisdiction that the applicant instituted the present proceedings.

The issues for determination.

[10] The issues to be determined by this court are set out in the minutes of the pre-trial conference as follows:

"7.1 whether the applicant referred the dispute to the Labour Court out side of the time limits prescribed by the Labour Relations Act, 1995 which there by necessitated an application for condonation for the late referral to be filed.

7.2 whether the termination of the applicants service due to operational requirement was substantively fair.

7.3 If so, whether the Applicant's refusal to accept the demotion to the position as proposed by the Respondent where he would not be required to manage staff, was fair and reasonable

7.4 Whether the determination of the Applicant's employment due to operational requirement was procedurally fair.

[11] As will appear later in this judgement the applicant closed his case without leading any oral evidence. Before dealing with the evidence presented by the respondent, it is important to highlight facts which are critical to the assessment of the onus placed on the respondent to show that the dismissal was for a fair reason. In this respect the facts admitted by the respondent in its response to the applicant's statement of case are stated as follows:

- The applicant was informed he should accept the demotion failing which his position would be made redundant and that refusal to accept the offer would result in him forfeiting the severance package. The respondent contended that this statement was however made in the context of consulting with the applicant and explaining to him that his behaviour was inconsistent with his position as a manager. It is also contended that the statement was made in the context where support staff had transferred or resign on account of the behaviour of the applicant. This included the exit interviews conducted with a number of employees who had since left the employ of the respondent.

- The respondent further in response to the allegation contained at paragraph 4.9 (page 20 para 2.7.3), of the applicant statement of case states the following:

"2.7.3 Full details of the responses from employees who had resigned from the Respondent were communicated to the Applicant and it was furthermore conveyed to the Applicant that he had failed to train, skill, develop and coach his staff effectively.

2.7.4 Moreover, it was conveyed to the Applicant that he had failed to provide effective leadership by failing to undertake performance management, succession planning, management change and transformation in order to create a high performance culture.

2.7.5 The Applicant refused to engaged the Respondent in regard to the allegation set out in the letter dated 05 October 2006 addressed to the Applicant as a result of which it was conveyed to the Applicant that the absence of him addressing the alleged short comings, the Applicant had to accept that he role as Area Sales Manager would be redundant and the applicant would be placed in a position were he was not required to manage staff. The proposal from the Respondent was that the Applicant be demoted to a position which did not require him to manage staff.

2.7.6 The Applicant refused the opportunity of alternative employment on the same terms and conditions of employment. The Respondent considered that the Applicant's refusal to move away from a position of managing subordinate on terms and conditions no less favourable to the Applicant was unreasonable."

[12] In response to the allegation that there was no consultation with the recognised trade union, the respondent states the following in its response:

2.18.2 The respondent avers that it was not necessary for it to hold consultations with any recognised union in terms of the retrenchment policy in relation to the Applicant either as alleged or at all. The Respondent avers that in the letter dated 05 October 2006 the Respondent notified the Applicant of the short comings it experienced the Applicant in regard to his management of subordinates and endeavoured to consult with the Applicant in regard to such short comings.

2.18.3 To the extent that the Applicant avers that he never received any charges the allegation is admitted. At no stage did the Respondent intend to discipline the Applicant for misconduct. The Respondent intended to

initiate an adequate enquiry procedure to establish the Applicant's incapacity as a manager."

[13] The respondent conceded that the applicant was not given the opportunity to address the charges concerning the allegations of his inability to manage personnel. It however contended that he was given the opportunity to respond to the allegation of his weak management.

[14] The background facts summarised above are also recorded in the pre-trial minutes as common cause facts. And more importantly for the purposes of determining whether the respondent has discharged its onus of showing that the dismissal was for a fair reason the following are recorded at paragraph 5 of the pre-trial minutes:

> *"5.25. No other employee was affected by the retrenchment*
>
> *5.26. the position of Area Sales Manager for Gauteng was not field and still exist in the Respondent. The position is not redundant.*
>
> *5.27. no consultations were held with the recognised trade union*
>
> *5.28. the Applicant did not receive any disciplinary charges and was not subjected to a disciplinary hearing."*

[15] In the supplementary pre-trial minutes (paragraph 1.2 at page 85) the applicant contends that there was no need to retrench him. In response to this averment the respondent states the following:

"1.2 The Respondent submits that there was no general need to retrench. However, the Respondent submits that it was obliged to specifically retrench the applicant based on operational requirement of the Respondent."

[16] It is further recorded in the supplementary pre-trial minutes (paragraph 2.2 at page 85) that:

"2.2 The Respondent submits that the dismissal of the Applicant was not based on either misconduct OR the Applicant's poor performance. The Respondent explained to the Applicant that a number of business managers and support staff had either transferred out of or resigned from their employment with the Respondent on account of the Applicant's management style."

[17] At paragraph 2.4 it is recorded that:

"2.4 The Applicant refused to engage the Respondent in regard to the need for the Applicant to address the perceived short comings in his management style. In (sick) absence of the Applicant addressing the alleged short coming, it was conveyed to the Applicant that his role as Areal Sales Manager would be made redundant and the Applicant will be placed in a position were he was not required to manage staff."

[18] At paragraph 3.2 of the supplementary pre-trial minutes it is recorded that:

"3.2 The Respondent submits that it did not consider selection criteria in identifying the Applicant as a candidate for retrenchment. The Applicant was the only Area Sales Manager who was identified for redeployment based on the Respondents operational requirement. The decision to redeploy the Applicant was taken as a last resort when the Applicant failed and refused to participate in counselling cessions and failed to acknowledge that the Applicant's identified short comings as a manager necessitated the Respondent taking appropriate steps to consult with him and ultimately redeploy him."

[19] In support of its version the respondent presented evidence from two of its employees. The first witness was Ms Winterboer who at the time the dispute arose was senior HR manager. She testified on how the business of the respondent was segmented into green, gold and platinum. The applicant was at the time of his dismissal employed in the green segment with ten people reporting to him. The green segment was an entry level for both clients and staff who could in time progress from there to gold and finally to platinum.

[20] Ms Winterboer testified that the respondent was faced with an economic down turn in the period leading to 2006 and had to embark on the voluntary retrenchments. A strategy was developed to address the challenge and one of the specific strategic objectives in the plan was the retention of staff. The retention of staff strategy was necessitated by the loss of staff by the respondent during that period.

[21] It was further the testimony of Ms Winterboer that there were difficulties in the work area of the applicant in relation to loss of staff. This problem was confronted by conducting a three hundred and sixty degree (360) feed back process involving managers who reported to the applicant.

[22] Except for the leadership function the applicant could not be faulted in other areas of his performance, like financial management and strategic planning. It was accepted that historically the performance of the applicant was good.

[23] Ms Winterboer testified that after completing the three hundred and sixty degree and the exit interviews of other employee, the applicant was called to a meeting where the issue of his leadership was discussed. The approach adopted by the respondent was, according to Ms Winterboer, necessitated by the crisis that had emerged in the applicant's area of work. The crisis arose according to her because of the loss of staff members some of who reported to the applicant.

[24] The second witness of the respondent Mrs Christianse who was the HR manager central region at the time of the dismissal of the applicant testified that the first time she came across the applicant was during the grievance proceedings initiated by Mr Dhlamini. The grievance, according to her concerned intimidation and "*bad mouthing.*" The details concerning the grievance were set out by Mr Dhlamini in an email he had sent to Mrs Christianse date 8 March 2006. In a hand written note inserted at the bottom of the email the applicant conceded to having had a discussion with Mr Dhlamini and that he (the applicant) spoke to him in an aggressive and intimidatory manner. The applicant

apologised and assured him that he would not do it again. Mr Dhlamini accepted the apology. The applicant was however, issued with the first written warning.

[25] Mrs Christianse also categorised the alleged situation arising from the alleged "attitude" of the applicant as being a crisis. She testified about the ten managers reporting to the applicant, eight of whom complained about his aggressive manner and threatened to resign.

The principles governing a fair dismissal

[26] Section 185 of the LRA protects an employee from unfair dismissal by the employer. A dismissal of an employee would be regarded as unfair in terms of s188 of the LRA if the fails to prove the following:

> "*(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."*

[27] In order to for a dismissal for operational reasons to be said to be fair the employer is expected to comply with the provisions of s189 of the LRA. In relation to procedural fairness of a dismissal for operational requirements the employer is in terms of s189 (1) of the LRA required to consult with the employee/s or their representatives when it contemplates a dismissal. Whilst, the duty to initiate the consultation process rests with the employer, s189 (2) (a) (i) of the LRA imposes the duty at attempting to reach consensus on the

appropriate measures to avoid or to mitigate the adverse effect of a dismissal on both parties, i.e. both the employer and the employee/s.

[28] In addition to the duty to initiate the process of consultation when contemplating a dismissal the employer is required by s189 (3)(b) of the LRA to disclose to the other (employee/s) consulting party the reasons for the proposed dismissal and the alternatives it considered before considering dismissal. In the same vein the employee/s has a duty to put forward alternatives to the proposed retrenchment. The employer is obliged to provide reasons if it rejects the employee's proposals.

[29] In relation to substantive fairness of a dismissal, it is trite that there is no distinction between dismissal arising from economic reasons and restructuring based on other business considerations. Another element of substantive fairness which the employer needs to satisfy is to show that in addition to either the economic or restructuring needs of the business, the dismissal was effected as a last resort. This principle is enunciated by Zondo JP in *Andre Johan Oostehizen v Telkom SA LTD* case (2007) 28 ILJ 2531 (LAC) at par [4] as follows:

> "*[4] Implicit in section 189 (2)(a)(i) and (ii) of the Act is an obligation on the employer not to dismiss an employee for operational requirements if it can be avoided. Accordingly, these provisions envisage that the employer will resort to dismiss as a measure of last resort. Such an obligation is understandable because dismissals*

based on the employer's operational requirements constitutes the so called no fault terminations."

Zondo JP went to further in the same case [at para 8] to say:

"In my view an employer has an obligation not to dismiss an employee for operational requirements if the employer has work which such employee can perform either without any additional training or with minimal training. This is because that is a measure that can be employed to avoid the dismissal and the employer has an obligation to take appropriate measures to avoid it and employee's dismissal for operational requirements. Such obligation particularly applies to a situation where the employer relies on the employee's redundancy as the operational requirements ... A dismissal that could have been avoided but was not avoid is a dismissal that is without a fair reason."

[30] This Court has previously stated that the above principles is informed by what Nicholson JA said in *General Food Industries Ltd v FAWU (2004) 7 BLLR 667 (LAC)* when he said:

"The loss of jobs through retrenchment has such a deleterious impact on the lives of workers and their family that it is imperative for that -even though reasons to retrench employees may exist -they will only be accepted as valid if the employer can show that all viable alternative steps have been considered and taken to prevent the retrenchment or to limit it to the minimum."

[31] The other important principle in the consideration of the fairness of the dismissal for operational reasons is whether the dismissal is genuinely justified by the operational requirements. See *FAWU and Others v SA Breweries LTD* (2002) 11 BLLR 1093 (LC) at 1109B-D and *Telkom SA (supra) and Decision Survey International (PTY) LTD v Dlamini and others* (1999) 5 BLLR 413 (LAC*).*

[32] The other duty imposed on the consulting parties is to seek consensus on the selection criteria to be used in selecting those of the employees to be dismissed for operational reasons. In the event of failure to reach consensus on the selection criteria by the parties s189 (7) of the LRA requires the employer to select the employees to be dismissed according to a selection criteria that is fair and objective.

[33] The issue that arises from the facts of the current case is whether the reasons advanced by the respondent for the dismissal of the applicant were genuine. The second issue, if the reasons for the dismissal were to be accepted as genuine, is whether the dismissal was a measure of last resort. In other words the respondent could do nothing to avoid the dismissal of the applicant.

[34] In my view, for the reasons set out below, the respondent has failed to show that the dismissal of the applicant was for a fair reason/s. The analysis of the facts of this case even on the version of the respondent indicates very clearly that the underlying reason for the dismissal was something unrelated to operational reasons. And even if it was to be found that there existed genuine

reasons for the retrenchment, the dismissal would still not meet the requirements of fairness because the evidence presented does show that the dismissal was effected as a last resort. The other issue that arises from the facts of this case is whether the respondent followed a fair procedure in dismissing the applicant.

Analysis and evaluation

[35] At the end of the respondent's case the applicant applied for absolution from the instance. The law regarding absolution from the instance was formulated in *Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G-H as follows:*

> *"When absolution from the instances is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (Gascoyne v Paul and Hunter 1917 TPD 170 at 173, Ruto Flour Mills Pty Ltd v Adelson (2) 1958 (4) SA 307 (T)."*

[36] Harms JA in *Gordon Page & Associates v Rivera & Another 2001 (1) SA 88 (SCA) at 92H-93A* quoted the above test with approval. The Learned Judge, in *Daniel* went further to say:

> *"This implies that a plaintiff has to make out a prima facie case –in the sense that there is evidence relating to all the elements of the claim –to survive absolution because without such evidence no court could find for*

the plaintiff (Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) at 37G-38A; Schmidt Bewysreg 4th ed at 91–2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (Schmidt at 93).”

The Court further held that:

“The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another “reasonable” person or court. Having said this, absolution at the end of a plaintiff’s case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice.”

In labour matters the onus of prove is governed by section 192 of the LRA which places the onus on the employer to show that the dismissal was for a fair reason.

[37] In my view, the facts and the circumstances of this case dictate for a departure from the ordinary procedure of granting absolution from the instances to that of granting a final judgment in favour of the applicant. The totality of the evidence and the material before this court supports the view that the dismissal of the applicant was both substantively and procedurally unfair.

[38] A close analysis of the pleadings and the version presented by the respondent indicates very clearly that the reason for the dismissal of the applicant was not

due to operational reasons but rather for other reasons unrelated to operational requirements.

[39] The procedure followed by the respondent in terminating the employment of the applicant was totally unfair in general but fundamentally because the trade union was not as required by section 189 (1) of the LRA, consulted prior to embarking on the process of the retrenchment. And more importantly the respondent failed to comply with its own retrenchment policy which provides under the heading "*Consultative Process*" as follows:

> "*The consultative process shall be conducted over a 2 (two) month period calculated from the dates upon which the consulting party or parties receive written notice in terms of the written notice clause above. No notice of termination of employment shall be furnished to an employee or group of employees prior to the expiry of this 2 (two) month period, unless otherwise agreed by the parties. During the consultative process the Company and the other consulting party or parties shall consult with an open mind on all aspects of the contemplated retrenchments in a bona fide attempt to reach consensus upon:*
>
> - *appropriate measures to avoid the contemplated retrenchments;*
> - *measures to minimise the number of retrenchments;*
> - *measures to change the timing of retrenchments;*

- *appropriate measures to mitigate the adverse effects of retrenchment;*
- *if applicable, selection criteria; and*
- *if applicable, several pay."*

[40] In as far as the substantive fairness is concerned, the respondent's case is based on the three sixty degree, the exit interviews and the complaints that had been raised against the applicant by other employees. In this respect the testimony of the two witnesses who testified on behalf of the respondent did not assist or advance the case of the respondent by any stretch imagination.

[41] When asked during cross examination why instead of demotion was the applicant not moved laterally to another position, Ms Winterboer testified that the reason for not doing that was because they were concerned with the leadership skills of the applicant. She contended further that they believed that the demotion was for a short period and intended to address the leadership development of the applicant.

[42] If indeed the applicant excelled in all the other areas of his work, it is not clear why he was not provided with training on leadership skills without having to be demoted. In my view even if lack of leadership skill was to be accepted as the valid reason for requiring the applicant to accept the demotion, no basis was laid down for such an allegation. In fact the picture created by the version of the respondent strongly suggest poor work performance on the part of the applicant more than any thing else. In this respect it is in fact important to note that, Ms

Winterboer conceded during cross examination that the reason for the dismissal of the applicant was because he would not take a demotion. She also conceded that the applicant was never afforded an opportunity to deal with the allegations that led to the conclusion that there was a crisis in the applicant's section arising from his leadership qualities.

[43] In essence the alleged poor leadership of the applicant is based on the exit interviews of three people. The one person who was interviewed did not resign but was transferred within the organisation itself. The exit interview of the second person seems to have no relation to the alleged leadership problems of the applicant. The only answer that Ms Winterboer, could furnish when asked during cross examination to explain this, was that she did not conduct the exit interview.

[44] The other example used by Ms Winterboer to show the alleged poor leadership of the applicant was the case of Mr Dhlamini. She conceded however under cross examination that she did not know the details that formed the basis of the alleged aggressive behaviour of the applicant in relation to Mr Dhlamini.

[45] It is common cause that Mr Dhlamini had lodged a grievance against the applicant. The grievance was processed by the respondent. The applicant accepted that the language he used in talking to Mr Dlamini was inappropriate. He apologised and the apology seems to have been accepted by Mr Dhlamini. He was as indicated issued with a first written warning. Thus, for all intents and

purposes, the complaint by Mr Dhlamini could not in fairness have formed the basis for the alleged dismissal for operational reasons.

[46] The testimony of Mrs Christianse also did not advance the case of the respondent that the dismissal of the applicant was for a fair reason. She initially said that three managers resigned as a result of the leadership problems of the applicant. However when questioned about this number she changed and said one business manager resigned. She further testified that the respondent was faced with the crisis because one business manager had resigned and further that all managers under the applicant's supervision scored below 3.5 in the performance assessments.

[47] In relation to the circumstances that gave rise to Mr Dhlamini lodging the grievance, Mrs Christianse could not provide the details thereof. She was not aware that the problem arose because Mr Dhlamini demanded to spent more time out of the office whilst was sixty percent of his function required him to be office based. The applicant refused accede to Mr Dhlamini's demand.

[48] His demand having been rejected Mr Dhlamini approached the applicant's supervisor who without consulting with the applicant gave him (Dhlamini) permission to spend more time out of the office.

[49] The exchange which led to the applicant using inappropriate language occurred when Mr Dhlamini apparently went to brag to the applicant that he had received permission from a senior to spent more time out of the office.

[50] Mrs Christianse did not dispute, when put to her that the reason why the second person resigned was because she had obtained a better offer with Standard Bank. She also did not dispute that the applicant approached her and requested that something be done to keep that person within the respondent.

Conclusion

[51] In summary: the respondent has failed to show that it followed a fair procedure in terminating the employment of the applicant. The respondent also failed to show that the dismissal of the applicant was for a fair reason. Thus the essential requirements of section 189 of the LRA were not complied with.

[52] The dismissal was substantively unfair in that no valid reason existed for the termination of the employ of the applicant. The real reason for dismissing the applicant was because he refused to accept a demotion. Even if it was to be accepted that a valid and genuine reason existed for the dismissal of the applicant, it cannot be said on the version of the respondent that the dismissal was the last resort after all possible alternatives were considered. The post which was occupied by the applicant prior to his dismissal was never declared redundant and was according to the respondent never filled. The respondent has also in this respect not made out a case as to why it would be inappropriate to order the reinstatement of the applicant. In the circumstances of this case, I see no why reason costs should not follow the results.

[53] In the premises I make the following order:

1. The late referral of the statement of case to this court by the Applicant is condoned.

2. The dismissal of the Applicant was both procedurally and substantively unfair.

3. The Respondent is ordered to reinstate the Applicant without loss of remuneration or benefits as at the date of his dismissal.

4. The respondent is to pay the costs of the applicant

Molahlehi J

Date of Hearing: 02 December 2009

Date of Judgement: 7 April 2010

Appearances

For the Applicant: Adv SC JG Rautenbach

Instructed by: Smith Sewgoolam Inc

For the Respondent: Adv T Mills

Instructed by: Cliff Dekker Attorneys