THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case No: C 424/18

In the matter between:

LOTZ, J J S **Applicant**

and

MEHLEKETO RESOURCING (PTY) LTD **First Respondent**

EOH HOLDINGS LTD **Second Respondent**

Heard: 11- 13 March 2019

Delivered: 02 April 2019

JUDGMENT

NIEUWOUDT, AJ

Introduction

[1] The applicant contends that he was retrenched and that his retrenchment was procedurally and substantively unfair. He also contends that the second respondent should be held jointly and severally liable for any order that this Court may make against the first respondent and for this proposition he relies on the provisions of section 200B of the Labour Relations Act[1] (the Act).

[2] Mr Travis Barnard, who was, at the relevant time the human resources business partner of the second respondent, but working for the first respondent, and Mr

[1] 66 of 1995, as amended.

Niren Singh, an executive director of the first respondent testified on behalf of the respondents. The applicant testified in support of his own case.

Salient facts

[3] The applicant is a project management professional with a BSc degree in mechanical engineering, an MBA and a diploma in project management.

[4] He was employed by the first respondent in terms of a letter styled "*Offer and conditions of employment"* dated 26 May 2016. The letter records his position as project manager and describes the first respondent as a business within the EOH (second respondent) group of companies.

[5] On 26 July 2016 the applicant assumed the position of project manager of the Western Cape Re-signalling Project, based in Cape Town. The client of the project was Thales. This project was the first of its kind in South Africa and included the replacement of mechanical interlocking devices by electronic interlocking devices on railway lines. It required in-depth signalling experience.

[6] When the applicant commenced employment, the project was 5% of completion and in November 2017, it had achieved 42% of completion. This measurement means the percentage of work of acceptable quality completed, gauged against the whole job.

[7] The applicant reported to a project admin manager (De Beer) who was employed by Thales, on a weekly basis. It was not suggested to him by either Thales or the first respondent that he was performing poorly or that he was unable to do his job.

[8] Thales discovered shortcomings in the work done when it started testing in August 2017. Thales discussed these issues with Mr Singh during November 2017, and informed him that it was not happy with the applicant and that it wanted him removed from the project. Its position was that the applicant was a

good project manager but that he didn't have the appropriate signalling experience.

[9] Mr Singh discussed the issue with the applicant who was surprised about it. At the instance of the applicant, Mr Singh approached Thales about the issue a second time and tried to persuade it to change its mind. He was unsuccessful. Thales did not want the applicant involved anywhere in the project. The first respondent offered the applicant a severance package but he did not accept it.

[10] The applicant was in receipt of legal advice from the end of 2017. On 15 January 2018 the first respondent handed a notice in terms of s189(3) to the applicant. The reason for the proposed retrenchment is described as:

> "Due to the project delays resulting from various reasons including the poor quality of workmanship the client has accelerated the project and consequently rescheduling the works. The project requirements have shifted to ensuring milestone achievements as well as the correct quality in terms of Railway Signalling. To this end signalling experience is required to meet the operational execution."

[11] The first respondent proposed that the method of selection for retrenchment should be the employee whose job is redundant and it envisaged that one employee would be affected. It informed the applicant that it would look for suitable alternative positions for him within the first respondent and the second respondent. The notice stated that the applicant should prepare for the consultation and that, should he require any further assistance or have any proposals, he should deal with them during the consultation sessions.

[12] Consultation sessions occurred on 16, 22 and 25 January 2018. The minutes of these meetings were not in dispute. At the last session on 25 January 2018, the first respondent informed the applicant that he would be retrenched and this was confirmed by way of a letter dated 29 January 2018. The applicant contended that he had a number of contract managers reporting to him, who had extensive signalling experience, and that it was thus not necessary for him to personally have extensive signalling experience. The respondent countered

that their experience was of a maintenance nature, which was not adequate and that the position itself required in-depth signalling experience.

[13] The applicant was not consulted on the positions of Messrs Labuschagne, Marshall, Mostert and Todkill or the possibility of bumping them. Mr Todkill replaced the applicant on the project. The applicant obtained fixed term employment in Granada with effect from 1 May 2018.

Evaluation

[14] The applicant contended that the second respondent ought to be jointly and severally liable for any judgment against the first respondent in terms of section 200B of the Act. He relied on various reasons, all of which relate to the fact that the first respondent operates as a wholly owned subsidiary of the second respondent and that it pays a management fee to the second respondent for various shared services. There is no merit in this contention. There is no reason to suspect, let alone any evidence to suggest, that the first and second respondent had the intention to defeat the purpose of any employment law or that their relationship had the effect of doing so. The corporate structure of the second respondent is one that is generally applied by groups.

[15] Although pleaded, the applicant did not contend during the proceedings that the first respondent should have insisted to continue to employ him despite the attitude of Thales and that the fact that he was dismissed at the instance of a third party caused it to be substantively unfair. His case was that:

15.1. The use of redundancy as a selection criterion was unfair.
15.2. The first respondent approached the retrenchment with a closed mind and did not consult with a view of seeking consensus.
15.3. The first respondent ought to have considered bumping as an alternative to retrenchment both in the first respondent and the second respondent.
15.4. The first respondent did not provide him with any information to enable him to make meaningful proposals about possible positions in the second respondent.

[16] The respondents countered that the applicant was a senior employee and that he had access to legal advice. He should thus have raised issues had he wished to consult on, during the consultations. These issues will be dealt with in turn. Before doing so, it might be useful to set out the applicable legal principles.

General principles

[17] In *Super Group Supply Chain Partners v Dlamini & another*[2] the Labour Appeal Court held that:

> [24] It is trite that an employer is permitted to dismiss an employee for its operational requirements. However, for the employer to do so successfully, it is obliged to have a bona fide economic rationale for the dismissal and to comply with the provisions of s 189 as well as s 189A of the Act where applicable. Section 189 imposes an obligation on the employer to consult the employee or its representative on the matters listed in subsection (2). There is a duty on the employer not only to consult the affected employee(s) but to take appropriate measures on its own initiative to avoid and minimize the effect of the dismissal. The consultation envisaged by the Act is a 'meaningful joint consensus-seeking process' in which parties to the process should attempt to reach some agreement on a range of issues that may best avoid the dismissal and where not possible to ameliorate the effects of the dismissal for operational requirements.
>
> [25] An employer should not approach the consultation process with a predisposition to a particular solution but approach the process with a mind open to persuasion to alternatives that are practical and rational. The employee party or its representative should be given a fair opportunity to suggest ways in which job losses might be avoided or the effects of the dismissal might be ameliorated before the dismissal. There also rests a duty on the employer to provide the employee or his or her representatives with relevant and sufficient information that would place them in a position to make informed representations and suggestions on the subjects specified for the consultation. It is not fair for an employer to shirk its statutory duty to consult and create an

[2] (2013) 34 ILJ 108 (LAC).

> onus on an employee to ensure that he or she chases the employer around to ensure that consultation takes place."

Redundancy as a selection criterion:

[18] Mr Venter contended that the first respondent applied redundancy as a selection criterion and submitted that this was unfair. He referred to para 260 of *National Union of Metalworkers of SA & others v John Thompson Africa*[3] where the Court stated:

> "Redundancy is not a selection criteria (sic) let alone being a fair one. It is a consequence of restructuring or changing the operations of an organization. From his explanation it is clear that Mr Rube did not in fact apply redundancy as a selection criterion, despite it being listed as such."

[19] A consideration of the facts of that matter, compared to the facts of the instant matter, show that in both cases, redundancy, although being described in the incorrect context, was no more than the fact that exposed the employees to the possibility of retrenchment.

Closed mind

[20] The duty to consult is not an abstract theoretical one and does not exist in a vacuum. Mr Lennox referred to *O'Doyle v All Circle Screenprint CC*[4], where the Court held that:

> [23] I do not believe that the Act imposes upon employers the burden of acting illogically. It only stands to reason that the circumstances in which a branch manager's services are terminated are somewhat different from the ordinary worker. Each case will have to depend on its own facts. I believe that s 189 of the Act is there to protect employees from unfair retrenchments and not to be over-prescriptive to the extent of absurdity.

[21] In *Sikhosana & others v Sasol Synthetic Fuels*[5] the Court held at 655F that:

---

[3] (2002) 23 ILJ 1839 (LC).
[4] (1999) 20 ILJ 191 (LC).
[5] (2000) 21 ILJ 649 (LC).

> "Compliance with s 189, in short, is neither a necessary nor a sufficient condition for the fairness or unfairness of the applicable act of retrenchment. The section gives content and colour to fairness in retrenchment and its significance as such should not be underrated; but ultimately it provides only a guide for the purpose, and cannot be treated as a set of rules that conclusively disposes of the issue of fairness."

[22] It is undisputed in this matter 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.

[23] In *SA Breweries (Pty) Ltd v Louw*[6] the Labour Appeal Court said the following about the consequences of a redundancy:

> "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."

[24] The only practical alternatives to retrenchment were employing the applicant in a vacant position in the first or second respondent or in a position where the applicant bumped the incumbent of a position for which he qualified.

[25] For the reasons set out below, it does appear as if not much time was spent in the consultation process on the issue of bumping. Was this the consequence of a closed mind or the result of the realities of the situation?

Bumping

[26] The position of Mr Marshall was that of project manager for the Gauteng project that was equivalent to the one that the applicant managed in the Western Cape. The evidence was that the position was actually vacant by the end of 2017 and that the closing date for applications was 12 December 2017. It is thus not

[6] (2018) 39 ILJ 189 (LAC) at para 19.

strictly speaking an issue of bumping. However, the evidence was that Siemens, who was the client of that project, had even more onerous requirements for signalling skills and experience than Thales did.

[27] There is no indication that this aspect was raised during the consultation. The first respondent seemed to rely on the opinion of Thales that the applicant did not have appropriate signalling experience. There is, however, no evidence before the Court that the opinion of Thales was warranted. Accepting (because it was not challenged) that it was not unfair that the retrenchment of the applicant was caused by the opinion of Thales and accepting that Siemens had even higher requirements in respect of signalling than Thales; this does not mean that the signalling ability of the applicant should not have been the subject matter of consultation to ascertain exactly what the applicant's abilities with regard to signalling were and how his ability could be co-ordinated with the abilities of other team members. The unchallenged evidence was that it was not.

[28] This aspect was thus not a theoretical issue, it seemed to have been the only realistic opportunity to avoid the applicant's retrenchment. It was thus unfair not to consult on it and this was probably caused by the fact that the mind of the first respondent was closed on this aspect.

[29] There were 20 to 30 people in the first respondent who reported to the senior project managers. In the trial they were referred to as construction managers. They earn, depending on whose evidence is accepted, between 10% to 25% of what the applicant had earned. Under the circumstances it is not realistic to have consulted on bumping one of them.

[30] Then there was Mr Labuschagne, a civil and building project manager; but he earned less than the applicant and had longer service. It would thus not have made sense to consider bumping in this regard either. The applicant suggested that the second respondent should have considered bumping an employee worldwide throughout the second respondent in order to accommodate him.

The Court was not presented with any authority placing such an obligation on an employer and is not aware of any.

[31] Lastly, it was contended that the possibility to bump Mr Todkill should have been the subject of consultation. This proposition is not easy to understand due to the fact that he in fact succeeded the applicant in the Western Cape project and apparently had appropriate signalling skills.

Vacancies in the second respondent:

[32] The second respondent is a large company employing about 11 000 people. Mr Barnard testified that he had sent the CV of the applicant to HR practitioners in the second respondent to look for vacancies. Mr Singh asked the divisional director, to whom he reported, about opportunities for the applicant. The applicant complains that he was not given any information about vacancies at all to enable him to consult on the issue. This is not a theoretical or an abstract issue. Accepting that there would not have been many potential vacancies at the level of the seniority of the applicant; fair consultation required a more comprehensive report back and discussion on this aspect.

Obligation on the applicant to raise issues:

[33] Employees who are faced with retrenchment go through a difficult time. This is true even for senior employees. It is not realistic to expect them to push against a door that appears to be closed. The applicant participated in the consultation process, he made proposals and objected to issues that he deemed to be unfair.

[34] The Court is satisfied that the blame for the failure of the first respondent to consult on the issues set out above, cannot be laid at the door of the applicant.

Conclusion

[35] The retrenchment of the applicant was substantively fair but procedurally unfair. The procedural unfairness lies in the failure to properly consult about possible vacancies in the second respondent and the position of senior project manager

in Gauteng. The first respondent did not fall far short in its endeavours to consult and this fact should be reflected in the relief awarded to the applicant.

[36] The Court was made aware of a tender made by the first respondent to the applicant. This tender did not influence the Court in deciding on an appropriate amount of compensation. What did play a role, was the relatively small degree of the neglect by the first respondent and the fact that the applicant secured employment, albeit on a fixed term and in another country, on 1 May 2018. Compensation in the amount of two months' remuneration is appropriate. It is common cause that the applicant earned R1 860 000 per year. Accordingly, two months' remuneration amounts to R310 000.

Costs

[37] The applicant was in agreement that the approach to costs set out by the LAC in *Member of the Executive Council for Finance, KwaZulu-Natal v Dorkin N.O.*[7] should be followed. The respondents submitted that the applicant should at least be ordered to pay the costs from the date that the offer had lapsed. If the ordinary civil rules applied, the applicant would have been liable for the costs from that date, not having secured a better result than the offer.

[38] The test in *Dorkin* suggests that costs should be ordered if a party was frivolous in bringing or conducting a suit. There are three issues:

38.1. Was the applicant acting frivolously in rejecting the offer? The Court does not think so.

38.2. By the same token the Court does not believe that the respondents were frivolous in defending the action.

38.3. Whilst the Court is of the view the applicant may have been frivolous in bringing the claim under section 200B of the Act, virtually no time was devoted to this issue. Further, the respondents used one set of legal representatives.

[7] (2008) 29 ILJ 1707 (LAC).

[39] Accordingly, it would be appropriate to make no order as to costs.

[40] In the premises, I make the following order:

Order

1. The dismissal of the applicant is procedurally unfair.
2. The first respondent is ordered to pay the applicant R310 000,00.
3. There is no order as to costs.

_____

H. Nieuwoudt

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ferdi Venter

Instructed by: Van Gaalen Attorneys

For the Respondent: M A Lennox

Instructed by: Botoulas Krause & Da Silva Inc