Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case No: C 464/2019

In the matter between:

SERVEST LANDSCAPING TURF MAINTENANCE (PTY) LTD	**Applicant**
and	
SACCAWU OBO THISANI, THOZAMA & 20 OTHERS	**First Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Second Respondent**
COMMISSIONER KATY KHUDUGA (*N.O.*)	**Third Respondent**

Date of Set Down: 20 October 2022

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court

website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 24 October 2022.

Summary: (Review – Award of severance pay – Application of s41(4) – Requirements of section satisfied if retrenches are offered suitable alternative employment with a new employer as a result of the efforts of the retrenching employer)

JUDGMENT

LAGRANGE J

Introduction

[1] This is an application to review and set aside an arbitration award in which the arbitrator found that the 22 individual respondents were entitled to severance pay when they were retrenched by the applicant ('Servest')

[2] The crux of the arbitrator's award is that she decided that the applicant failed to prove that the individual respondents obtained alternative employment with another employer on the basis of the applicant offering them employment with another employer, namely Bidvest Topturf ('Bidvest'). She found that, at best, the applicant "did play a part in facilitating the employment of the applicants by Bidvest, but to suggest that it has secured such employment in the absence of an agreement between the parties in this regard is to take matters to far".

Grounds of review

Jurisdictional issue

[3] Servest contends that the retrenchment process was still underway when the individual respondents took up employment with Bidvest. Accordingly, it did not dismiss them and they were not eligible for severance pay because they were not retrenched. It claims that they had agreed to their terms and conditions of employment with Bidvest before any notice of retrenchment was issued to them.

[4] Accordingly, it contends that the arbitrator ought to have required the individual respondents to prove that they had been retrenched before considering whether they were entitled to severance pay.

[5] In argument in the review proceedings, counsel for Servest did not pursue this argument, after the court had expressed its initial misgivings about it. Although the case at the arbitration hearing was presented and argued on the basis that the employees began working for Bidvest immediately after they stopped working for Servest (which appears to have been common cause), it was never expressly contended that their services with Servest had been voluntarily terminated rather than being retrenchments at the instance of Servest.

[6] In the circumstances, there was nothing unreasonable about the arbitrator failing to first determine if, in fact, the employees were retrenched. In any event, on the evidence as a whole, I am not persuaded that Servest could have succeeded in proving on a balance of probabilities that the termination of the employees services did not amount to a retrenchment, even if it was agreed that their services with Servest would end on a certain date, on the understanding that Bidvest would employ them with effect from the following day. Consequently, this jurisdictional point must fail.

Reasonableness of the arbitrator' s finding that s 41(4) of the Basic Conditions of Employment Act, 75 of 1997 ('the BCEA') did not apply

[7] In essence, the arbitrator concluded that it was not at the instance of Servest that the retrenched employees found alternative employment with Bidvest. SACCAWU argues that the retrenchment notice made no mention of the prospect of alternative employment being obtained. The service of the individual respondents came to an end when the applicant's contract ended in January 2019.

[8] The arbitrator distinguished the case before her from the case of *Irvin & Johnson Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2006) 27 *ILJ* 935 (LAC). In *Irvin & Johhnson*, the retrenching employer made it a condition that the successful bidder for the services it was outsourcing, would have to employ its existing staff engaged in the service

being outsourced[1]. Factually speaking, the arbitrator was correct in finding that the scenario before her was different. *In casu*, there was no obligation imposed by Servest on Bidvest and no evidence of any legally binding undertaking made by Bidvest to Servest that it would employ all the former staff of Servest.

[9] The question which arises is whether the *Irvin & Johnson* decision means that, in the absence of such mutually binding obligations, an offer of alternative employment by another employer could never satisfy the requirements of s 41(4). The LAC clearly did not think that to be the case. The court analysed the purpose of the section thus:

> "[41] The fundamental question that arises in construing s 41(4) is this: What is the mischief that s 41(4) of the BCEA seeks to address or, put differently, what is the purpose of s 41(4)? Section 41(4) provides that an employee forfeits his right to severance pay if he unreasonably refuses the employer's offer of alternative employment with that employer or another employer. It seems to me that what the drafters of the Act foresaw was that an employer could arrange alternative employment for an employee but the employee might reject such alternative employment for no sound reason and simply take the severance pay. The drafters seem to have taken the view that that would not be acceptable and that, if an employee rejected the employer's offer of alternative employment for no sound reason, he should not be paid severance pay. It seems that the purpose was to discourage employees from unreasonably rejecting offers of alternative employment arranged by their employers simply because they might prefer cash in their pockets in the form of severance pay. It can also be said that the BCEA sought to promote employment and to give employers an incentive to take steps to try to get alternative employment for their employees facing dismissals for operational requirements instead of simply giving them money in the form of severance pay and leaving them on their own to look for alternative employment. In the light of this it seems to me that the purpose of severance pay in our law is not necessarily to tide the employee over while he is looking for another job. If that was the purpose, an employee who immediately walks in to another and sometimes even better paying job after his dismissal would not be entitled to severance pay because he would have no need for it."

(emphasis added)

[10] The LAC went on to identify the three scenarios in which severance pay would be payable or not:

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[1] At para [4].

> "[44] It seems to me that the effect of s 41(4) is that, where the employer has arranged alternative employment for an employee who is facing a (possible) dismissal for operational requirements, either in his employ or in the employ of another employer, three scenarios are possible:
>
> • The one scenario is that the employee unreasonably refuses such alternative employment in which case s 41(4) applies and the employee forfeits the right to severance pay.
>
> • The second scenario is where the employee reasonably refuses such alternative employment in which event he is entitled to payment of severance pay.
>
> • The third scenario is where the employee accepts the alternative employment in which event he also forfeits the right to severance pay."

(Emphasis added)

Further, the court also had the following to say about the refusal of an offer of alternative employment:

> "[42] … if an employee who is facing dismissal for operational requirements is offered an alternative employment but not by his employer or through the efforts of his employer and he turns it down and, in so doing, acts unreasonably, he does not forfeit his right to severance pay."

(Emphasis added)

From the dicta above, it is clear that the LAC did not envisage that only the existence of a binding obligation on another employer to employ retrenched workers could justify relieving the retrenching employer of the obligation to pay severance pay. The court clearly envisaged that a retrenching employer would not be required to pay severance pay if it 'arranged' the alternative employment or the offer was brought about as a result of its efforts.

[11] In *Vergenoeg vir Seniors v Stone and Others* (JA 45/08) [2010] ZALAC 35 (4 June 2010) the LAC confirmed this approach. In *Vergenoeg*, the employees argued that the retrenching employer, who was outsourcing certain services, could not offer employment with the employer who was going to provide the outsourced service. This contention was based on the fact that before being employed by the new employer, the individual employees had to be evaluated first. The LAC dismissed this argument because it was common cause that throughout the whole process the old

employer had negotiated with the new one to employ its former staff, and "as a result of [its] efforts the individual employees were employed.[2]"

[12] By contrast, in *Fidelity Supercare Cleaning (Pty) Ltd v Busakwe NO & others* [2010] 3 BLLR 260 (LC), the retrenching employer only provided a favourable reference for a former employee, who was employed on the strength of that reference by the new company, which had taken over the contract formerly serviced by it. The court held that the facts in the matter were distinguishable from *Irvin & Johnson*, because the old employer did not "arrange" alternative employment but simply facilitated it by way of providing a reference[3].

[13] In this matter, the arbitrator acknowledged that the branch manager of Servest, Ms C Van Der Westhuizen ('VDW') testified that she had initiated the meetings with Bidvest, because Servest had previously been in the position that Bidvest was. Her testimony was that she emailed Mr J Odendaal ('Odendaal'), the general manager of Bidvest and told him that Servest could not accommodate a lot of the staff, and a meeting was arranged for him to meet available staff on 8 January 2019. Her evidence was that the interviews conducted by Bidvest were not to determine whether or not Bidvest would take on staff but simply to 'meet and greet' them. Bidvest took over all the staff who wanted to work for them. The process of Bidvest signing up Servest's staff took place over a fortnight and was done at Servest's premises using its facilities and resources. She also pressed Bidvest for confirmation of the persons it had employed so Servest could still offer employment to anyone who did not take up employment with Bidvest. All the employees of Servest who were willing to work for Bidvest were employed.

[14] The only witness called by the individual respondents, Mr Marubele, agreed that he did not know what transpired between Servest and Bidvest. However, he surmised that the same thing had happened as happened on a previous occasion when a company had lost the contract and Servest replaced that company. On that occasion it was the Servest which

[2] At para [18] (emphasis added).

[3] At para [27].

approached them to work for it. He agreed that he did not have an interruption in his employment.

[15] Mr N Kock ('Kock'), the site manager, testified that Servest had two landscape gardening positions available which were offered to the affected staff but only one of them was interested in a position. In the end, even that person also chose to sign up with Bidvest. Van der Westhuizen testified that the applicant made it very clear in the consultations that they did not want their staff to be unemployed and if they could not be employed by Servest they would do everything they could to make sure Bidvest would. She also testified that when they told staff that Bidvest was taking over, the staff wanted to speak to Bidvest and were not very open to taking up other positions with Servest. However, if Bidvest had come back to say they were not going to take everyone Servest tried to ensure that there would still be time to offer them other positions in Servest.

[16] The arbitrator decided, notwithstanding Van der Westhuizen's unchallenged evidence, that the emails exchanged between management of Servest and Bidvest from mid December 2018 merely demonstrated that Van der Westhuizen was querying with Bidvest, how many employees it would take on and when that would happen. She accepted that Servest gave employees paid time off to obtain all the documents which Bidvest required for their employment, but in her view this could not be construed as Servest having "secured alternative employment for the applicants" with Bidvest. At best, it meant that Servest played a part in facilitating the employment by Bidvest, "but to suggest that it has secured such employment in the absence of the agreement between the parties in this regard is to take matters to far" (emphasis added).

[17] Servest contends that the arbitrator erred in law in her reading of *Irwin & Johnson*. It argues that no contractual obligation to take on former employees of the retrenching employer was necessary to indemnify a retrenching employer from a claim for severance pay. Relying on the authority of the LAC in *Vergenoeg vir Seniors v Stone and others* (JA 45/08) ZALAC 35 (4 June 2010), it argued that it is sufficient if the retrenching

employer negotiated with the new employer and, as a result of its efforts, the retrenched employees were employed by the new employer, even if the employees were first to be evaluated by the new employer.

[18] In its interpretation of the authorities Servest is correct. However, that is not sufficient reason to review and set aside the award. It is still necessary to ask if the arbitrator's ultimate finding that s 14(4) did not apply, could nonetheless be justified on the evidence before her if the correct legal principles are applied.

[19] It is plainly evident from the correspondence between the two firms since mid-December 2018 that there was a collaborative process underway between them in order for Bidvest to hold interviews and make offers employment to Servest's staff who were facing retrenchment. The only issue which is unclear from the correspondence itself is who initiated the process. It is true that Bidvest's email of 13 December 2018 speaks of Odendaal wanting to arrange a meeting to get some details regarding Servest's existing staff members and that he asks to hold interviews with existing staff for "potential employment with our new contract with Grand West". However, the initiation of the process was clarified by Van der Westhuizen's own evidence, which is summarised above. That evidence was to the effect that Servest set the ball rolling by approaching Bidvest to take on staff it could not accommodate. Her evidence clearly showed that Servest followed up on the progress that Bidvest was making in the recruitment of its staff and Bidvest used its facilities extensively in the recruitment process.

[20] The process described by Van der Westhuizen cannot be equated with an employer who merely gives a staff member a good reference and advises them to approach the employer who is taking over a contract from it. Servest kept a close eye on the Bidvest's recruitment of its staff and made its premises and facilities available to Bidvest to try to ensure that nobody would be left unemployed, and that staff moving to Bidvest would not lose a day's work. The end result was that everyone who wanted to be employed by Bidvest was, so there is no evidence that the interviews were in fact a barrier to employment with Bidvest. The arbitrator failed to appreciate that

Van der Westhuizen's evidence in this regard was undisputed and her account of the efforts Servest made was not challenged under cross-examination. This failure most probably sprang from the arbitrator's misunderstanding of the legal principle, in terms of which she regarded anything less than a binding undertaking obtained by Servest from Bidvest as irrelevant to the determination of liability for severance pay.

[21] In the circumstances, I am satisfied that the arbitrator made an error of law which led her to disregard or minimise the significance of material evidence. That resulted in her making a finding that no reasonable arbitrator could have made on the evidence. Had she not made the error she would have concluded that s 14(4) of the BCEA did apply.

Order

[22] The arbitration award dated 2 June 2019 issued under case number WECT2927-18 by the Third Respondent is reviewed and set aside and substituted with a finding that the persons listed in Annexure "A" to the award were not entitled to severance pay in terms of s 14(4) of the Basic Conditions of Employment Act 75 of 1997.

[23] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

Representatives

For the Applicant	T Du Preez instructed by Van der Spuy & Partners

For the First Respondent	C Tyalidikazi from SACCAWU