IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 518/16

In the matter between

VALAKELIS, PARIS	**Applicant**
and	
VAN DER MERWE, FRANCOIS *N.O*	**First Respondent**
COMMISSION FOR CONCILIATION, MEDIATION	
AND ARBITRATION	**Second Respondent**
RENAISSANCE SECURITIES (PTY) LTD	**Third Respondent**

Heard: **09 May 2018**

Delivered: **27 March 2019**

JUDGMENT

MAHOSI. J

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Introduction

[1] This is an application brought by the applicant in terms of section 145 of the Labour Relations Act (LRA)[1] to review and set aside the arbitration award issued by the first respondent (the arbitrator) under the auspices of the second respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA), under case number GAJB19608-15 dated 10 February 2016. In his award, the arbitrator found that the applicant's retrenchment was fair.

[2] The key question is whether the arbitrator's decision is one that a reasonable decision-maker could not reach.

[3] Prior to outlining the applicant's case in detail and considering the issues that gave rise to the claim, it is necessary to outline the facts that form the relevant background to the dispute between the parties.

Material background facts

[4] The third respondent operates as a stock broker that deals on the Johannesburg Stock Exchange and offers advice to clients. The applicant started working for the third respondent during 2013 as a Trainee Analyst/Associate in its research department. From 01 January 2014 to June 2015, the applicant joined the equity sales department after which he re-joined the research department again as a Trainee Analyst/Associate.

[5] During May 2015, a business strategy proposal was made to the third respondent's Head Office in Russia in terms of which two options were made for the purpose of, *inter alia*, cost saving and revenue increase. The first option was for the expansion of coverage to liquid mid-cap companies which included the use of trainee analysts who would be mentored and developed by the Head of Research Department, Mr Rey Wium (Wium). However, Wium resigned on 31 July 2015. As a result, the third respondent could no longer implement option one

[1] Act 66 of 1995 as amended.

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because it no longer had the capacity to develop trainees. Rather, it needed an analyst with a track record to implement option two.

[6] On 24 August 2015, the two trainee analysts, including the applicant were invited to individual meetings. At the meeting, the applicant was informed that the third respondent contemplated his retrenchment and was presented with a choice whether to engage in a voluntary retrenchment or to engage in a formal consultation process. The applicant considered the options and informed the third respondent on 25 August 2015, that he chose to go through a formal consultation process. On the same day, the applicant was presented with a formal section 189(3) of the LRA notice.

[7] On 26 August 2015, the applicant requested the third respondent to provide him with financial information, which was provided to him on 27 August 2015 after signing confidentiality agreement. On 28 August 2015, a meeting was held between the parties and their attorneys during which meeting the third respondent attempted to proceed with the formal consultation process. However, the applicant was unwilling to participate in the consultation as he had formed a view that he had already been dismissed or that a decision to dismiss him had already been taken.

[8] On the same day, the third respondent issued the applicant with a dismissal letter. Aggrieved by the third respondent's decision to dismiss him, the applicant referred an unfair dismissal dispute to the CCMA. The dispute was conciliated unsuccessfully and the applicant referred the dispute to arbitration. The arbitration was held on 1 and 2 February 2016. The arbitrator issued the award on 10 February 2016 in terms of which he found the applicant's retrenchment to be fair. It is this award that is the subject of this application.

Award

[9] The basis on which the arbitrator found the applicant's retrenchment fair appears in his award as follows:

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> 'In this particular case the motivation behind the decision to restructure and contemplating dismissal for operational requirements has been reasonably explained. Clearly there was a substantial loss to the bottom line of the business. There was a managerial decision to change focus from an option one to option two, in which structure the position of two trainee analysts became redundant. There does not appear to be any ulterior motive behind the restructuring or refocusing. In my view the respondent's failure to provide more detail concerning option two does not deserve a negative inference, particularly because the failure to pursue option one is reasonably explained. Ross' evidence that Wium was to mentor the applicant in the mid-cap strategy was not materially challenged. The fact that Ross was at times augmentative does not mean that her version must generally be rejected. In my view it would be inappropriate in this case to too finely analyze the appointment of more directors or the standing of the research department's own revenue - it is not for the arbitrator to tell the respondent how to run its business or to direct what would make the best commercial sense.'[2]

[10] The applicant's case was mainly that he was dismissed on 24 August 2015. However, the arbitrator was not convinced that the dismissal took place on 24 August 2015. His behaviour after the 24 of August 2015 was assessed by the arbitrator and was found not to be indicative of a person who had been dismissed. In any event, the applicant conceded during cross-examination that he was dismissed on 28 August 2015 when he was issued with a dismissal letter.

[11] The applicant's decision not to participate in the consultation was based on his perception that a predetermined decision was taken concerning his dismissal. His perception was created because of the drawing of a line on the old organogram removing the employee by the employer's attorney during the meeting of 24 August 2015 and the wording of section 189(3) of the LRA letter. The applicant further relied on a discussion which he had with his colleague, Pretorius, and a meeting and dinner attended by colleagues in which he was not present. The arbitrator dismissed the applicant's perception, the basis of which appears in his award as follows:

[2] Amended Index: Pleadings, page 21 at para 21

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‘26. The starting point is the discussion at the meeting on 24 August 2015. According to Ross the scratching out of the block was a proposal on how the future could look should the respondent proceed with a formal retrenchment program, whilst an off the record option/settlement was offered. In the transcript of the meeting of 28 August 2015, the applicant’s attorney states that the crossing through the block on the organogram said that the position was redundant. The applicant conceded that he was not told that he was to be retrenched, but that his position had become redundant. Not much turns on the movement of the block’s position from one organogram to the other.

27. Section 189 of the labour relations act contemplates a process to be followed” where an employer contemplates dismissing one or more employees…” Subsection (1) read together with subsection (3) suggests that the employer may already be contemplating the dismissal for operational reasons (retrenchment) with reference to, inter alia, a number of employees and job categories. In my view, it was not necessarily unfair for the employer to have taken a stance already on 24 August that the two trainee analysts positions would have to go.

28. Even if the scratching out of the applicant’s block/face may at first sight be seen as somewhat insensitive, the applicant had the opportunity to think the matter over and he indicated the following day that he was opting for a formal consultation process.

[12] It was on the basis of the above that the arbitrator found the applicant’s decision not to participate in consultation to be unreasonable.

[13] The arbitrator was not convinced that the applicant was unfairly selected for retrenchment because the other mid-cap trainee who was also identified for redundancy was better qualified and experienced than him; the new employee was a senior rated analyst and Wium was not replaced. It was on the basis of the above considerations that the arbitrator found that the applicant’s retrenchment was for a fair reason. The grounds on which the applicant seeks to have the award reviewed and set aside are considered herein below.

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Grounds of review

[14] The applicant attacked the award on the basis that the arbitrator failed to grapple with any of his challenges to the third respondent's operational requirements in that he accepted at face value, that the third respondent's loss in the preceding financial year and the managerial decision "*to change focus from an option one to option two*" justified his dismissal. In so doing, according to the employee, the arbitrator failed to interrogate the commercial rationale of the decision to terminate his employment.

[15] The employer opposed this application on two grounds. The first ground was that the case advanced by the applicant at review and the central focus of his attack is different from that advanced before the arbitrator. The second ground is that the applicant failed to demonstrate that the arbitrator failed to consider material issues before him.

Test for review

[16] The test laid down in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[3] is a test for the substantive reasonableness of the outcome or result of an arbitration award, which is an outcome based enquiry,[4] entailing a stringent test aimed at ensuring that arbitration awards are not lightly interfered with.[5]

[17] In *Bestel v Astral Operations Ltd and Others,*[6] the Court stated as follows:

> 'It is important to emphasise, as is exemplified from *Carephone*, and in *Schwartz***,** *supra,* that the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great

[3] [2007] 12 BLLR 1097 (CC).
[4] *Ellerine Holdings Ltd v Commission for Conciliation, Mediation and Arbitration and others* (2008) 29 *ILJ* 2899 (LAC) at 2906H-I.
[5] *Fidelity Cash Management Services v CCMA and Others* [2008] 3 BLLR 197 (LAC) at para 100; *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)* [2013] 11 BLLR 1074 (SCA) at para 13.
[6] [2011] 2 BLLR 129 (LAC) at para 18.

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> care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.'[7]

[18] For the applicant to succeed with the review application, he must have established that the arbitrator's decision fell outside the bounds of reasonableness on all the material that was before him, including for the reasons not considered by the arbitrator.[8]

Analysis

[19] The issue before the arbitrator was whether the third respondent had a fair reason to dismiss the applicant based on its operational requirements and whether the process followed to retrench him was fair. Section 188[9] read with section 192(2)[10] of LRA require an employer to prove that the dismissal was fair. In *NUMSA obo Maifo and Others v Ulrich Seats (Pty) Ltd,*[11] this Court stated as follows:

> 'It is trite that employers are entitled to dismiss employees for "operational requirements" based on economic, technological or structural needs. However, as a general principle, the law discourages the employers from a quick resort to retrenchment if it can be avoided. The essential criterion is whether the retrenchment was *bona fide* and economically rationale. The other principle is that in addition to showing the existence of economic rationality for the retrenchment, the employer has to show that the retrenchment was unavoidable.'

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[7] Id fn 5 at para 18.

[8] *Fidelity Cash Management Services v CCMA and Others* [2008] 3 BLLR 197 (LAC) at para 103.

[9] '(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove -
(a) that the reason for dismissal is a fair reason -
(i) related to the employee's conduct or capacity; or
(ii) based on the employer's operational requirements ; and
(b) that the dismissal was effected in accordance with a fair procedure.
(2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act.

[10] Section 189(2) provides that "If the existence of the dismissal is established, the employer must prove that the dismissal is fair."

[11] (2012) 33 ILJ 2918 (LC) at para 30.

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[20] The LAC restated the test to evaluate the substantive fairness of dismissal related to operational requirements in *Haveman v Secequip (Pty) Ltd*[12] as follows:

> 'A fair reason is one that is *bona fide* and rationally justified, informed by a proper and valid commercial or business rationale. The enquiry is not whether the reason put up is one which would have been chosen by the court but whether the reason advanced considered objectively is fair.' Footnote omitted

[21] In *SACWU and Others v Afrox Ltd,*[13] the court held that:

> '… By making fairness of the dismissal a matter of proof (section 188(1) (a) and 192(2), the LRA has made the assessment of fairness dependent on the factors proved and canvassed in evidence in court. This imposes a discipline upon the parties to the dispute and the person hearing the case. If an employer wishes to show that it considered appropriate options other than dismissal it must present evidence to that effect and explain why it chose a particular course and not another. If an employee wishes to challenge that evidence it must do so by proper cross-examination on the relevant issues and, if considered necessary, by leading rebutting evidence. If this shows up the untenability of the employer's position, it will have a material effect in the final assessment of fairness. The presiding officer's assessment of fairness or otherwise of the dismissal will also be dependent on the evidence presented before him or her. As assessment on "moral" considerations not based on evidence led at the trial will be impermissible…'

[22] In explaining why it chose to restructure its business, the third respondent presented evidence that there was substantial loss in the bottom line, which necessitated its decision. Further evidence was that a proposal to save costs and to increase the revenue was made in which two options were considered and the resignation of the head of research department had an effect of rendering the

[12] JA 91/2014 at para 28, delivered 22 November 2016 at para 28; See also *Johnson & Johnson (Pty) Ltd v CWIU* [1998] 12 BLLR 1209 (LAC). *Kotze v Rebel Discount Liquor Group (Pty) Ltd* (2000) 21 ILJ 129 (LAC) at para 36; *BMD Knitting Mills (Pty) Ltd v SACTWU* [2001] 7 BLLR 705 (LAC) at para 19 and *CWIU and Others v Algorax (Pty) Ltd* [2003] 11 BLLR 1081 (LAC).
[13] [1999] 10 BLLR 1005 (LAC) at para 43.

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employee's position redundant as there was no longer capacity to run a trainee analyst strategy. The applicant failed to challenge that evidence by proper cross-examination on the relevant issues or by leading rebutting evidence.

[23] As a result, the arbitrator found that the third respondent's motivation to restructure its business was reasonably explained. Therefore, there was nothing before the arbitrator to suggest that the restructuring and the possible retrenchment process embarked upon was not based on a *bona fide* rationale, commercial and operational need to cut costs in order to improve profits. It was on the basis of the above considerations that the arbitrator found that the applicant's retrenchment was for a fair reason.

[24] Section 189(1) of the LRA requires the employee to consult with affected employees prior to embarking on retrenchment programs and provides as follows:

> '(1) When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult -
>
> (a) any person whom the employer is required to consult in terms of a collective agreement;
>
> (b) if there is no collective agreement that requires consultation –
>
> (i) a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and
>
> (ii) any registered trade union whose members are likely to be affected by the proposed dismissals;
>
> (c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals; or

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(d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.

[25] Section 189(2)[14] of the LRA requires the parties to engage in a meaningful joint consensus-seeking process in an attempt to agree on appropriate measures *inter alia,* to avoid and minimise dismissals; to identify the employees to be retrenched; to change the timing of the dismissal; and to mitigate the adverse effects of the dismissal. The question is whether, subsequent to its decision to restructure its business, the third respondent complied with its obligations in terms of section 189 of the LRA. It is common cause that the applicant was offered voluntary retrenchment, which he refused. This resulted in a formal retrenchment process being undertaken. The evidence before the arbitrator was that a letter of the contemplated retrenchment was issued to him on 25 August 2015.

[26] It is common cause that the consultation meeting was held on 28 August 2015 and further that prior to that meeting, the applicant requested and was provided with the third respondent's financial information. However, the applicant chose not to participate in the consultation due to his perception that the decision to retrench him was pre-determined which perception was dismissed by the arbitrator. In *Enterprise Foods (Pty) Ltd v Allen and Others,*[15] the Court held that:

> 'The phrase which is required to do the key work in this section is "**when an employer contemplates…the employer must consult...**" In my view, the word 'contemplate' does not exclude an employer from developing a preliminary approach upon which a decision may be based.'

[14] (2) The employer and the other consulting parties must in the consultation envisaged by subsections (1) and (3) engage in a meaningful joint consensus-seeking process and attempt to reach consensus on:
(a) appropriate measures -
(i) to avoid the dismissals;
(ii) to minimise the number of dismissals;
(iii) to change the timing of the dismissals; and
(iv) to mitigate the adverse effects of the dismissals;
(b) the method for selecting the employees to be dismissed; and
(c) the severance pay for dismissed employees.'

[15] Case no CA13/2002 at para 23.

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[27] The fact that the third respondent had formed a strong view about the possible solution did not mean that a decision was taken to dismiss the applicant. As such, the arbitrator's decision to dismiss the applicant's perception was reasonable. The applicant's refusal to participate in a joint consensus-seeking process was self-defeating as he deprived himself of an opportunity to reach together with the third respondent, consensus on appropriate measures to avoid dismissal, minimise the number of dismissals, change the timing of the dismissal and mitigate the adverse effects of the dismissal.

[28] The applicant's submission that the arbitrator failed to evaluate the fairness of his dismissal objectively is not supported by evidence that was presented before the arbitrator. It is my view that the arbitrator was reasonable in his assessment of the evidence before him. He reached a conclusion that any reasonable decision-maker could have reached on the issue of the probabilities of the versions placed before him. The manner in which he analysed the evidence and the arguments, does not support the applicant's version that he misconstrued the enquiry he had to conduct or that he ignored materially relevant facts.

[29] The applicant further failed to establish that the arbitrator conducted the enquiry incorrectly because, as the award reflects, he dealt with the issue before him correctly and he considered all the evidence that was placed before him. What the applicant seeks to do in this application is to bring an appeal against the decision of the arbitrator in a guise of a review. This cannot be countenanced.

[30] The applicant has not established any basis upon which the Court could find that the award was reviewable. As such, he failed to discharge the *onus* of establishing that the arbitrator either committed misconduct in relation to his duties as an arbitrator, a gross irregularity in the conduct of the arbitration proceedings, or that he exceeded his powers. There is, therefore, no reason for this Court to interfere with his award.

Costs

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[31] In terms of section 162 of the LRA, this Court has wide discretion in awarding costs. The Constitutional Court has recently reiterated in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others,*[16] that costs orders should be made in accordance with the requirements of law and fairness. In this matter, the requirements of law and fairness dictate that there should be no order as to costs.

[32] In the circumstances, I make the following order.

Order

1. The application to review and set aside the arbitration award under case number GAJB19608-15 dated 10 February 2016, is hereby dismissed.

2. There is no order as to costs.

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D. Mahosi

Judge of the Labour Court of South Africa

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[16] (2018) 39 ILJ 523 (CC); [2018] 4 BLLR 323 (CC) at para 24.

Appearances

For the Applicant:	Advocate HM Viljoen
Instructed by:	Ramsay Webber Inc
For the third Respondent:	Advocate FA Boda SC
Instructed by:	Cliffe Dekker Hofmeyer Inc

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