IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
IN DIE ARBEIDSAPPÈLHOF VAN SUID-AFRIKA

Johannesburg

REPORTABLE
RAPPORTEERBAAR

CASE NO: CA 10/2002
SAAK NR: CA 10/2002

In the matter between:
In die saak tussen:

PIONEER FOODS (PTY) LTD t/a SASKO
PIONEER VOEDSEL (EDMS) BPK h/a SASKO **Appellant**

and
en

STEPHANUS NICOLAAS JANSE VAN RENSBURG Respondent

JUDGMENT-UITSPRAAK

WILLIS JA:

[1] The legal representatives of both parties addressed the court in English. I am mindful of the fact that this judgment may well be read by a wider audience, many of whose members may be

unfamiliar with Afrikaans. I have therefore prepared the judgment in English. Both of the parties are Afrikaans-speaking; the papers were prepared in Afrikaans; the evidence was led in Afrikaans; the judgment of the court *a quo* was given in Afrikaans; the Heads of Argument in the appeal were prepared in Afrikaans; and counsel for both parties are Afrikaans-speaking. In the absence of any clear language policy in the courts, I consider it appropriate that a translation of this judgment be given in Afrikaans. It follows at the end of the judgment in English. . In the event that there is a conflict between the Afrikaans and the English versions, the English shall prevail.

[2] The court *a quo* (*per* Revelas J) found that the dismissal of the respondent (applicant in the court *a quo*) was unfair and made the following order:

" 1. The termination of the applicant's services was unfair.

2. The respondent is ordered to pay the applicant compensation in the amount of R196 846,20 being twelve months' salary;

3.The respondent is ordered to pay the costs of this application."

[3] The employer (who was the respondent in the court *a quo*)

appeals against the aforementioned finding and order of the court *a quo.* For the sake of convenience, I shall refer to the appellant as "the employer" and the respondent as "the employee."

[4] Bokomo Co-op and Sasko (Pty) Ltd merged during 1997 to form the employer. It was this fact which led ultimately to the termination of the services of the employee. The employee's services were terminated on 31st October, 2000 as a result of the employer's operational requirements. At all material times, the restructuring of the employer was in progress.

[5] The employee was informed on 4th September 2000 that he should attend a meeting the next day. The meeting indeed took place. Mr Lourens, the employer's general manager, Mr Koch, the employer's sales manager for the Western Cape, Mr Leng, the employer's human resources manager, the haasbroel, the employer's sales manager for the Cape Metropole and the employee were present. Apart from Mr Haasbroek, all these persons testified in the trial in the court *a quo.* At this meeting, the following was discussed:

i) that the operational requirements of the employer could possibly lead to the fusion of the posts of senior representative (which at that time was held by the employee) and the business development post (which at that time was held by one Mr Swart) into one post which would be known as a “marketing position”.

ii) A proposal that the employee and Mr Swart make application for the new position;

iii) That the services of the unsuccessful candidate be terminated as that candidate would then be redundant.

During this meeting, the employee was given a letter in terms of section 189 (3) of the Labour Relations Act, No 66 of 1995 as amended (“the LRA”). In response to that which had been conveyed to him, the employee agreed that the fusion of the two posts made sense to him and he would accept the selection process. At that stage he made no other proposal. He made written application for the new post on 6th September, 2000. At the same time he made an alternative proposal in respect of an early pension in the event that he was not appointed to the new post.

The employer had no authority to confer an early pension. The employee was informed in writing on 7th September 2003 that the pension fund rules would not allow this. The interview for the post took place on 8th September, 2000. The employee's application was unsuccessful. He was informed accordingly on 11th September 2000. The position was awarded to Mr Swart. It is common cause that there was a good rapport between the employee and Mr Leng. It is also common cause that, at the relevant time, there were no other suitable positions available in the group. The employee himself conceded this. It may well be so that the management at the time of the meeting on 5th September 2000 thought that Mr Swart would have a better chance of being successful in the interview. Indeed, the court *a quo* came to this conclusion. Nevertheless, this conclusion stands in conflict with the evidence of Mr Koch who testified that in his opinion the two candidates would have had an equally good chance. Mr Leng said that the employee indeed possessed the skills which were necessary for the new post. It is indeed noteworthy that Mr Swart

who was called by the employee, conceded that he could not dispute the evidence of Mr Lourens that the purpose of the interviews was to treat the employee and Mr Swart on an equal footing. Mr Swart also testified that he was shocked and disturbed when he was told that the two positions would be merged and that he and the employee would be invited to apply for the new position. This seems to indicate that he himself was not sure that he would be the successful candidate before the outcome was announced. Mr Swart said, under cross-examination, that he was never given any assurance before the outcome was announced that he would be successful. Mr Swart was asked during his evidence-in-chief why he considered the dismissal of the employee to have been unfair. He gave a number of reasons. Essentially, he said he considered it wrong that such a fine person with a good record of service with the employer should lose his job. Undoubtedly, it was sad and unfortunate that this should have occurred but none of Mr Swart's reasons would amount to unfairness as recognised by law.

[6] The employee was appointed by Bokomo Co-op as a

representative in 1989. He therefore had more than ten years' service at the time of his interview on 7th September, 2003. He was 55 years' old at that stage. He received a severance package. The amount thereof is not in issue. The employee obtained a position with a competitor of the employee in October, 2000, the month after his dismissal.He was paid by both his old and new employers for this month. During the hearing of the matter, it became clear that the employee had succeeded in being in almost continuous employment from the time of the termination of his services with the employer.

[7] The employee's case is that he was confronted with a *fait accompli* and that he was denied his right to proper consultation and a proper consideration of alternative and less drastic solutions. It was submitted, on behalf of the employee, that management had made up its mind before the interviews took place that the employee would be the one who would lose his job. There is no direct evidence to this effect. The facts proven do not compel one to draw this conclusion as a nessesary inference. Mr Swart at one stage claimed to have been under the impression that he would be successful because he was better qualified but this does not justify the inference contended for by the employee. Furthermore, that inference is undermined by Mr Swart's own evidence as to his nervousness at the time. The employee did not ask for re-instatement. He asked for compensation only. The court *a quo* found in favour of the employee in the light of the abovementioned facts. The learned judge found that the interviews were a "sham". There is no dispute that insofar as the objective reasons for the termination of the employee's services were concerned, the employer was *bona fide.*

[8] It is not clear whether the court a quo actually found that Mr Swart had been assured, prior to the interviews that he would be successful or whether it found that Mr Swart may have been under that impression. To the extent that the court *a quo* did make a firm finding in this regard it was not, as indicated earlier, permitted by the evidence. The employee's legal representative submitted, during the course of argument, that the employer should have done more. When asked to make concrete suggestions as to what else the employer could reasonably have done, he was bereft of ideas. The employee's legal representative was constrained to agree that had it been his client who had been successful, rather than the other way round, that he would not be able to submit that there had been any unfairness.

[9]The case hinges therefore on whether or not the requirements of section 189 of the LRA were properly complied with. It is common cause that there was no applicable "*collective agreement*" or "*workplace forum*" or "*trade union*". The employee raised no objection that any relevant information in terms of section 189 (3)

of the LRA had been withheld from him. The employee's legal representative was unable to suggest what relevant information could have been provided. In my opinion in only remaining question is therefore whether a "meaningful joint consensus-seeking process" (see subsection 189 (2) of the LRA) took place between the parties between 4th and 11th September, 2000. In my opinion, more could not reasonably have been expected from the employer in the circumstances. The employer set out its difficulties, it presented a proposal (with reasons) and this was accepted by the employee. The employer considered the employee's proposal regarding an early pension and this was, unavoidably, rejected.

[10] In **S.A. Clothing & Textile Workers Union & Others v Discreto- A Division of Trump & Springbok Holdings** (1998) 19 ILJ 1451 (LAC) the court said at 1454I-1455A:

" For the employee fairness is found in the requirement of consultation prior to a final decision on retrenchment……The function of a court

scrutinising the consultation process is …. to pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham."

[11] Suppose that the management believed that, at the time of the interview on 5th September 2000, that Mr Swart stood a better chance of obtaining the position. Does this mean that the whole process was a sham ('n "skyn") I do not think so. It is well known that the result of an interview for a job opportunity is not necessarily a foregone conclusion. The employer has discharged the burden of proof that the reasons why the employee and Mr Swart were invited to apply for the new position were *bona fide* ("genuine"). As I have already said, the employee agreed with the proposed procedures.

[12] The court *a quo was* therefore wrong in finding that the dismissal of the employee was unfair.

[13] There is no reason why costs should not follow the result.

[14] The following order is made:

1) The appeal is upheld;

2) The order of the court *a quo* is set aside and the following is substituted therefor:

‘‘ The application is dismissed with costs”

(3) The respondent is ordered to pay the costs of the appeal

AFRIKAANS TRANSLATION

AFRIKAANSE VERTALING

WILLIS AR:

[1] Die regsverteenwoordigersvan beide die partye het die hof in Engels aangespreek. Ek neem kennis van die feit dat hierdie uitspraak wel gelees mag word deur ‘n wyer gehoor, waarvan ‘n aantal lede onvertroud met Afrikaans mag wees. Ek het dus my uitspraak in Engels voorberei, Beide partye is Afrikaans-sprekend; die stukke is in Afrikaans voorberei; die getuienis is in Afrikaans gelei; die uitspraak van die hof *a quo* is in Afrikaans gelewer; die Hoofde van Betoog in die appèl is in Afrikaans voorberei; en die advokate vir beide partye is Afrikaans-sprekend. In die afwesigheid van enige duidelike taalbeleid in die howe, dink ek dat dit toepaslik

sal wees dat ‘n vertaling van hierdie uitspraak in Afrikaans gelewer word. Om diè rede het ek ’n Afrikaanse vertaling van die uitspraak voorberei. Dit volg aan die einde van die uitspraak in Engels. Indien daar ‘n konflik is tussen die Afrikaanse en die Engelse weergawes sal die Engelse weergawe heers.

[2] Die hof *a quo* (*per* Revelas R) het bevind dat die ontslag van die respondent (applikant in die hof *a* quo) onbillik was en het die volgende bevel gemaak:

“ 1. Die applikant se diensbeëindiging was onbillik.
2. Die respondent word gelas om aan die applikant kompensasie ten bedrae van R196 846.20 synde twaalf maande se salaris te betaal.

3. Die respondent word gelas om die koste van hierdie aansoek te betaal.”

[3] Met verlof van die hof *a quo* kom die werkgewer (respondent in die hof a quo) in hoër beroep teen gemelde bevinding en bevel. Gerieflikheidshalwe, sal ek na die appellant as “die werkgewer” en die respondent as “die werknemer” verwys.

[4] Gedurende 1997 het Bokomo Koöp en Sasko (Edms) Beperk saamgesmelt om die werkgewer te vorm. Diè feit het uiteindelik gelei tot die diensbeëindiging van die werknemer. Die werknemer se dienste is op 31 Oktober 2000 beëindig weens die werkgewer se bedryfsvereistes. Die herstruktuering van die werkgewer was op alle tersaaklike tye aan die gang.

[5] Op 4 September 2000 is die werknemer meegedeel dat hy ‘n

vergadering die volgende dag moet bywoon. Die vergadering het wel plaasgevind. Mnr Lourens, die werkgewer se algemene bestuurder, mnr Koch die werkgewer se verkoopsbestuurder in die Wes-Kaapse platteland, mnr Leng die werkgewer se menslike hulpbronne bestuurder, mnr Haasbroek die werkgewer se verkoopsbestuurder in die Kaapse Metropool en die werknemer was teenwoordig gewees. Al die bogenoemde persone het in die verhoor in die hof *a quo* getuig, behalwe mnr Haasbroek. By hierdie vergadering is die volgende bespreek:

i) dat die bedryfsvereiste van die werkgewer moontlik tot die samesmelting van die poste van senior verteenwoordigerpos (op die stadium beklee deur die werknemer) en die besigheidsontwikkelingspos (op die stadium beklee deur ‘n ene mnr Swart) tot een pos, wat as `n “bemarkingpos” sou bekend staan, kon lei;

ii) ‘n voorstel dat die werknemer en mnr Swart aansoek doen vir die nuwe pos;

iii) dat die diens van die onsuksesvolle kandidaat beëndig sou word omdat die kandidaat oortollig sou wees.

Gedurende die vergadering is die werknemer ‘n brief gegee in

terme van artikel 189 (3) van die Wet op Arbeidsverhoudinge nr 66 van 1995 soos gewysig (“die Wet”). Die werknemer het, in beantwoording op wat aan hom oorgedra word, te kenne gegee dat die samesmelting van die twee poste vir hom sin maak, en dat hy akkord sou gaan met die keuringsproses. Hy het nie op daardie stadium enige ander voorstelle gemaak nie. Op 6 September 2000 het hy skriftelik aansoek gedoen vir die nuut geskepte pos. Terselfdetyd het hy ’n alternatiewe voorstel aangaande ‘n vervroegde pensioen geopper indien hy nie in die pos aangestel sou word nie. Die werkgewer het geen volmag gehad om die pensieon te vervroeg nie. Op 7 September 2003 is die werknemer skiftelik deur die werkgewer in kennis gestel dat die aftreefonds se reëls dit nie so toelaat nie. Op 8 September 2000 het die werknemer se onderhoud vir die pos plaasgevind. Die werknemer se aansoek was onsuksesvol. Hy is op 11 September 2000 sodanig ingelig. Die pos is aan mnr Swart toegeken. Dit is gemene saak dat die werknemer en mnr Leng goed oor die weg gekom het. Dit is ook gemene saak dat op daardie relevante stadium daar geen ander geskikte vakature in die groep was nie. Die werknemer het self dit toegegee. Dit mag wel so wees dat

bestuur ten tye van die vergadering op 5 September 2000 gedink het dat mnr Swart ’n beter kans gehad het om in die onderhoud suksesvol te wees. Die hof *a quo* het dan ook tot die bevinding gekom. Nietemin, staan diè bevinding in teenstryd met die getuienis van mnr Koch wat getuig het dat die twee kandidate, in sy opinie, ’n ewe goeie kans sou gehad het. Mnr Leng het gesê dat werknemer wel oor die vaardighede beskik het wat nodig was vir die nuwe pos. Dit is dan ook verder noemenswaardig dat mnr Swart, wat deur die werknemer geroep is, toegegee het dat hy nie die getuienis van mnr Lourens, dat sy doel met die onderhoude was om vir die werknemer en mnr Swart gelyk te behandel, kan betwis nie. Mnr Swart het ook getuig dat hy geskok en onsteld was toe hy vertel is dat die twee vakature saamgesmelt sou word en dat hy en die werknemer uitgenooi sou word om aansoek te doen vir die nuwe vakatuur. Die blyk ‘n aandiuding te wees dat hy homself nie seker was dat hy die suksesvolle kandidaat sou wees alvorens die uitslag aangekondig is nie. Mnr Swart het gesê, onder kruis ondervraging, dat hy nooit enige versekering gegee is alvorens die uitslag aangekondig was dat hy suksesvol sou wees nie. Mnr Swart is gevra gedurende sy getuienis in hoof hoekom hy

die ontslag van die werknemer as onbillik sou beskou. Hy het ‘n aantal redes gegee. Hy het hoofsaaklik gesê dat hy dit as verkeerd beskou dat so ‘n ordentlike persoon met ‘n goeie diens rekord by die wekgewer sy werk moet verloor. Dit was sonder twyfel hartseer en ongelukkig dat die werknemer sy werk verloor het maar geen van Mnr Swart se redes sou neerkom op onbillikheid soos erken in die reg.

[6] Die werknemer is gedurende 1989 deur Bokomo Koöp as verteenwoordiger aangestel. Hy het dus meer as tien jaar diens ten tye van sy onderhoud op 7 September 2003 gehad. Hy was 55 jaar oud op die stadium. Hy het ‘n uittredingspakket ontvang. Die bedrag hiervan is nie ter sake nie. In Oktober 2000, die maand na sy afdanking het Die werknemer ‘n betrekking verkry by ‘n mededinger van die werkgewer Hy is deur beide sy ou en nuwe werkgewer betaal hierdie maand. Gedurende die verhoor van die saak het dit duidelik geword dat die werknemer basies voortdurent werk gehad het vanaf die beëndiging van sy dienskontrak met die werkgewer.

[7] Die werknemer se saak is dat hy gekonfronteer is met ’n *fait accompli* en dat hy sy reg tot behoorlike konsultasie en behoorlike oorweging van alternatiewe en versagtende oplossings ontsê is. Daar is betoog, namens die werkmemer dat die bestuur tot ‘n besluit gekom het al voorens die onderhoude plaasgevind het en dat die werknemer die een sou wees wat sy werk sou verloor. Daar is geen direkte getuienis in diervoege nie. Die feite bewys dwing nie ‘n mens om slegs tot hierdie gevolgtrekking te kom as ‘n noodwendige afleiding nie. Mnr Swart het op een stadium beweer dat hy onder die indruk was dat hy suksesvol sou wees omdat hy beter bekwaam was maar dit regverdig nie die afleiding soos betoog is deur die werknemer nie. Vervolgens word die afleiding ondergrawe deur Mnr Swart se eie getuienis aangaaande sy senuweeagtigheid op daardie tydstip. Die werknemer het nie vir heraanstelling in die verhoor gevra nie. Hy het slegs om vergoeding gevra. Die hof *a quo* het, na aanleiding van bogenoemde feite, in die guns van die werknemer bevind. Die geleerde regter het bevind dat die onderhoude ‘n “skyn” was. Daar is geen geskilpunt aangaande die objektiewe redes vir die diensbeëindiging van die werknemer dat die werkgewer *bona fide*

was.

[8] Dit is nie duidelik of die hof a quo eintlik bevind het dat Mnr Swart wel verseker was, alvorens die onderhoude, dat hy suksesvol sou wees of dat dit bevind is dat Mnr Swart onder die indruk mag verkeer het. Dat die hof a quo dermate wel tot die vaste bevinding gekom het in die verband, was die hof nie, soos vroeër aantoon is, toegelaat na aanleiding van die getuienis nie. Die werknemer se regsverteenwoordiger het betoog, gedurende in die loop van sy argument, dat die werkgewer meer moes gedoen het. Toe hy gevra is om tasbare voorstelle te maak oor wat die werkgewer redelikerwys kon gedoen het, is hy stom geslaan. Die werknemer se regsverteenwoordiger is gedwing om saam te stem dat indien sy klient suksesvol sou gewees het, in plaas van anders om, hy geen bewering sou kon opper dat daar enige onbillikheid was nie.

[9] Die saak berus dus op die vraag of die vereistes van artikel 189 van die Wet behoorlik nagekom is of nie. Dit is gemeensaak dat daar geen toepaslike "*collective agreement*" of "*workplace forum*" of "*trade union*" was nie. Die werknemer het geen beswaar geopper dat enige relevante inligting in terme van artikel 189(3) van die Wet van hom weerhou is nie. Die werknemer se regsverteenwoordiger was nie in staat on enige voostelle te maak aangaande informasie wat verskaf sou kon word nie. Na my

mening is die enigste oorblywende vraag dus of daar ’n “meaningful joint consensus-seeking process” (sien sub-artikel 189 (2) van die Wet) tussen 4 en 11 September 2000 onder die partye plaasgevind het of nie. Myns insiens, in diè omstandighede, kon daar nie meer, redeliker wys, van die werkgewer, verwag word nie. Die werkgewer het sy probleme uiteengesit, sy voorstel (met redes) gegee en diè is deur die werknemer aanvaar. Die werknemer se voorstel om ’n vervroegde pensioen is deur the werkgewer oorweeg en is onvermydelik verwerp.

[9] In **S.A. Clothing & Textile Workers Union & Others v Discreto- A Division of Trump & Springbok Holdings** (1998) 19 ILJ 1451 (LAC) het die hof te 1454I-1455A gesê:

“ For the employee fairness is found in the requirement of consultation prior to a final decision on retrenchment……The function of a court scrutinising the consultation process is …. to pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham.”

[10] Veronderstel dat die bestuur geglo het, ten tye van die onderhoud op 5 September 2000, dat mnr Swart ‘n beter kans sou

staan om die pos te verkry. Beteken dìt dat die hele proses ’n skyn (“sham”) was? Ek dink nie so nie. Dit is welbekend dat die uitslag van ’n onderhoud om ‘n werksgeleentheid nie noodwendig ‘n vooruitgemaakte saak is nie. Die werkgewer het die bewyslas gekwyt dat die redes waarom die werknemer en mnr Swart uitgenooi is om aansoek te doen vir die nuwe pos, *bona fide* (“*genuine*”) was. Soos ek reeds gesê het, het die werknemer met die voorgestelde prosedures saamgestem.

[11] Die hof *a quo* het dus gefouteer in die bevinding dat die ontslag van die werknemer onbillik was.

[12] Daar is geen rede waarom kostes nie die uitslag moet volg nie.

[13] Die volgende bevel word gemaak:

1) Die appèl slaag;

2) Die bevel van die hof *a quo* word ter syde gestel en word met die volgende vervang:

“ Die aansoek word met koste afgewys.”

3) Die respondent word gelas om die koste van die appèl te betaal.

DATED IN JOHANNESBURG THIS DAY OF

GEDATEER TE JOHANNESBURG HIERDIE DAG VAN SEPTEMBER 2003.

N.P.WILLIS
JUDGE OF THE LABOUR APPEAL COURT

REGTER VAN DIE ARBEIDSAPPÈLHOF

I agree. The decision to render the judgment in English with an Afrikaans translation was that of my brother Willis JA alone. I express no view as regard to language practise in a case such as this.
(Ek stem saam. Die besluit om die uitspraak in Engels te lewer met 'n Afrikaanse vertaling was die van my ampsbroer Willis AR alleenlik. Ek spreek geen mening uit aangaande taalgebruik in 'n geval soos die nie.)

R.M. ZONDO

JUDGE PRESIDENT OF THE LABOUR APPEAL COURT

REGTER-PRESIDENT VAN DIE ARBEIDSAPPÈLHOF

I agree. I too express no view as to language policy.

(Ek stem saam. Ek spreek ook geen mening uit aangaande taalbeleid nie.)

C. R. NICHOLSON

JUDGE OF THE LABOUR APPEAL COURT
REGTER VAN DIE ARBEIDSAPPÈLHOF

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Respondent se Prokureurs: Willem Jacobs & Assosiate

Date van appeal: 21st August 2003

Datum van appèl: 21 Augustus 2003

Date of judgment: 23 December 2003

Datum van uitspraak: