

Sneller Verbatim/HVM

CASE NO. J3513/99

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

2000-12-07

In the matter between:

J M KOCK

(10)

Applicant

and

ENVIROSERVE WASTE MANAGEMENT

Respondent

J U D G M E N T

Delivered on 8 December 2000

REVELAS J:

1. Mr Jacobus Kock, the applicant, was employed by the respondent during June 1997 in the position of national waste manager. During December 1997 he was appointed as operational supervisor which position he retained until his services were terminated with effect from 30 June 1999 due to the respondent's operational requirements.
2. The applicant accepted that the respondent experienced financial difficulties which necessitated restructuring. It was also not disputed by him that discussions pertaining to the restructuring were held with all the respondent's employees including the applicant.
3. It was further the applicant's case that employees were told that after retrenchment any new re-employment opportunities would be communicated

to them. It was also not disputed that the positions to be affected was explained with an organogram.

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- 4.The applicant's case is that during the restructuring process his position never really became redundant and that there was no need to terminate his services.
- 5.Before scrutinising the applicant's allegations regarding his retrenchment it is necessary to examine the respondent's restructuring process in the context of the nature of its business. (10)
- 6.The respondent's business mainly concerns the management of different forms including inter alia medical waste such as hazardous and non hazardous waste. Different divisions of the respondent operated as such in different regions. One of the divisions is the Samu Med division which manage medical waste in Gauteng. Samu Med operated in Kimberley, Roodepoort and Rietfontein, near Edenvale. This application concerns the two latter divisions.
- 7.Prior to the restructuring which commenced in 1999, the following managerial supervisory sales related and administrative positions existed in this division: (20)
1. Regional manager.
 2. Customer liaisons person.
 3. Secretary.
 4. Sales manager.
 5. Regional operational manager.
 6. Supervisors (four), and
 7. Waste consultants (four).
- 8.The investigations and advice obtained during the restructuring had as a result that two incinerator supervisors were transferred from the Samu Med division to the respondent's Hi-Tech Divisions which could appro-

priately accommodate these positions.

9.The positions of Regional Operational Manager and the Roodepoort Store Supervisor were made redundant and the

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single position of Transport Supervisor was changed to that of Fleet Officer, Rietfontein. This is according to the respondent's pleadings.

10.At Roodepoort, the Operational Manager, the position held by Mr Brink, and the position of Operations Supervisor, the applicant's position, were consolidated into one position to be advertised as: "Transport Supervisor - Roodepoort". According to the respondent, the new position was on a higher grading than the applicant's position and on a lower grading than Mr Brink's former position. The remuneration was lower than what was paid to Mr Brink but higher than what was paid to the applicant.

11.The consolidation of the two positions caused a saving of approximately R11 000,00 per month for the respondent. The respondent avers that the applicant's position became redundant as a result of this consolidation. The applicant, on the other hand says the position was no more different than the position held formerly by him.

12.The applicant applied for the position along with four other candidates. He was unsuccessful and a Mr De Neysen was appointed. This appointment, the applicant says, is unfair because the functions as set out in the advertisement for the transport supervisor are exactly the same functions which he had performed. The applicant did not accept that the new position was a managerial one as the job description reads: "Supervisor".

13.Mr Oosthuizen, the respondent's general manager, was not able to dispute, when it was put to him, that the applicant had

performed the functions as set out in the advertisement.

14. The applicant, during cross-examination stressed that Mr

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Oosthuizen did not exactly have a detailed knowledge of the applicant's function. This the applicant argues, supports his contention that he was unfairly treated.

15. What the applicant could not dispute, was that some of the functions performed by Mr Brink, which was a managerial position, was on a much higher scale than those performed by the applicant, and would become the duties of the new incumbent. (10)

16. The applicant could also not dispute that the latter had six years' experience in the transport business and had obtained a transport diploma. Because he was more qualified than the applicant, Mr de Neysen was appointed and although the duties pertaining to the newly created post of Transport Supervisor, Roodepoort, on face value, coincides with the duties pertaining to the post of the applicant in terms of the old structure, the similar duties were now to be performed in a managerial capacity and not in a supervisory capacity as was the case previously.

17. The new incumbent had to manage the entire fleet at Roodepoort as well as that at the Rietfontein Depot including aspects such as the implementation of a vehicle monitoring system, measurement of productivity, investigation of optimal vehicle routine, development of new price models and not only the supervision of control of the daily fleet activities. (20)

18. The applicant was not in a position to dispute this as the facts show to the contrary.

19. Mr Oosthuizen and Mr Hall consulted with the applicant on three occasions. Each meeting lasted, on the applicant's version, for approximately one hour each. They attempted to persuade

the applicant to accept the position of a

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fleet officer in Rietfontein. The applicant found this offer unacceptable and declined it. His reasons for declining the offer was, firstly, that he was inconvenienced and would have had to travel approximately one hour and 45 minutes longer than usual to Rietfontein. The applicant lives with his parents in Randfontein and was not prepared to move closer to Rietfontein. He lived with his parents and felt that if he left he could no longer support them. (10)

20. Secondly, the applicant contended that he would suffer a severe reduction in salary of almost R4 000,00. The evidence showed this to be factually incorrect. The salary which the applicant would earn as a fleet officer would be approximately R1 000,00 less than he previously earned. It was also explained that this was due to an amendment of the relevant income tax legislation in terms of which the applicant would no longer be entitled to a subsistence allowance which forms parts of his remuneration and structured as such.

21. The applicant was also offered the opportunity to obtain a diploma in Transport Management sponsored by the respondent. He would thus be able to study to improve his qualification at the Rand Afrikaans University and enhance his chances for promotion. It is of note that Mr De Neysen had such a qualification which was one of the reasons why he was regarded as more qualified for the position. (20)

22. Despite the fact that the respondent intended to groom the applicant for a position similar to that of Mr De Neysen, the applicant refused to accept the offer. The applicant believed that Mr De Neysen was appointed by the respondent because he was related to one of the respon-

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dent's directors, a fact which was admitted by the

respondent.

23.This allegation of nepotism flies in the face of the objective facts. The applicant himself was appointed by his brother-in-law, who was a manager at the respondent at the time, a fact which the applicant did not disclose. Mr Jacobson, the applicant's brother-in-law and a former employee of the respondent, was successful in establishing that his own services were unfairly terminated by the respondent and therefore the applicant argues, the respondent had some form of a grudge against the applicant.

24.There was no evidence to support the aforesaid. It is highly improbable that an employer would go to all the trouble to consolidate two positions just to get rid of the applicant because he was related to a former employee. This also flies in the face of the reasonable offer of another position together with sponsored further education which was offered, to the applicant. It was quite clear that the respondent held out the prospect for the applicant to be groomed in a new position and not to get rid of him.

25.The applicant argued that the respondent could have appointed him as an Incinerator Supervisor at Roodepoort as an alternative to a demotion and for the same reason as advanced by him and referred to above, he contended that the respondent's failure to appoint him in this position was an unfair labour practice.

26.It is common cause that if he was appointed as an Incinerator Supervisor at Roodepoort he would earn R3 000,00 per month, almost half of what he would have earned in the Fleet Officers' position at Rietfontein.

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27.It is further common cause that the applicant would be required to work nightshifts at the incinerators in Rietfontein and renders his argument of the extra

travelling and inconvenience which he put forward in respect of the Fleet Officers' position, quite disingenuous.

28. In the light of these facts the respondent can hardly be blamed for not offering this position to the applicant. Furthermore the respondent had no idea that the applicant was at any stage interested in this position because the applicant did not even apply for the position or ever raised it with the respondent.

29. Some time after the applicant was offered the alternative position at Rietfontein, and after the ⁽¹⁰⁾above arrangement for the position was entered into, the applicant contacted the respondent, more specifically Mr Oosthuizen, in order to determine whether the respondent would still appoint him in the said position. It is common cause that the position would be held open for a month after determination of his services.

30. The applicant was advised that in the light of the arrangements already made and in terms of which the respondent reflected a further saving, the respondent was not prepared to re-open the offer to the applicant and advised him accordingly.

31. It would be unfair in most circumstances, to offer an employee a position who declines it and nonetheless undertake that he could at a later stage ⁽²⁰⁾apply for the position and this promise is not kept.

32. In the present case, the applicant was adamant that he did not want the position in Rietfontein. After three meetings which each lasted an hour, two members of

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management could not persuade him to take up the offer. In unreasonable circumstances he refuted that his position had become redundant and insisted on being appointed on a managerial level.

33. In such circumstances it cannot be said that the failure to offer him a

position which he rejected on three former occasions, is unfair. Even if it is unfair, this would be a situation where in keeping with the considerations expressed in the matter of Johnson and Johnson v CWIU ([1998] 12 BLLR 1209), the employee would not be entitled to compensation.

34. Insofar as costs are concerned, the applicant persisted in pursuing a case without any merit against the respondent.

35. On the other hand I do have to take into account that the respondent had promised him that it would keep the position of Fleet Officer open for a month, which offer was basically reneged on. In such circumstances costs should not be awarded against the applicant.

36. In the circumstances I make the following order:

The application is dismissed. There is no order as to costs.

E. Revelas

In person

Adv. M.J. van As instructed by:

Wentzel, Viljoen & Swart Att.