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IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: J4955/00

2002.05.31 J5246/00

In the matter between

BOLHUIS Applicant

and

HOTEL BOULEVARD Respondent

J U D G M E N T

NGCAMU, A.J: The applicant was dismissed by the respondent on the basis of operational requirement on 29 February 2000. The applicant challenged the dismissal. The dispute was referred to the CCMA. When the conciliation failed the applicant referred the dispute to this court. The respondent alleges that the dismissal was both substantively and

procedurally fair. The dismissal is not in dispute. The respondent's business is mainly the operation of hotels. It also caters for banqueting, conferences and weddings. The applicant was responsible for the banqueting section of the hotel. This section experienced difficulties as a result of other areas opening up. The banqueting section had its own staff. As a result of the difficulties a decision was taken to close down the banqueting section. The hotel could still retain the restaurant because it also provided lunch and breakfast. The restaurant was profitable. It however became necessary to restructure and to reduce staff.

Letters were addressed to the applicant by the managing director setting out the problems. The first letter was written on 14 January 2000. The applicant was offered several alternatives. This included offering the restaurant to the applicant to rent and operate it for her own benefit. She was required to take over all the restaurant staff. Another alternative was for her to take up the duties as a restaurant and kitchen manager at a reduced monthly salary of R5 000 plus bonus. The third option was for the applicant to take the position of general manager's secretary at plus/minus R2 500 per month. The letter stated that if she refused the options,

severance payment would be made. The applicant was required to respond by 17 January 2000.

When the applicant was advised of the problems the respondent was experiencing and the need to restructure she never questioned this. The applicant initially did not refuse the offer of taking over the restaurant. She however put forward certain conditions to be met before accepting the offer. Applicant made it clear that she wanted the position of the general manager occupied by Mr Le Roux. She did not make any proposal regarding the severance payment offered.

In a meeting of 17 January 2000 the applicant insisted that she wanted the position of a general manager. She addressed a letter to Mr Hamilton indicating her concern about Mr Hamilton's refusal to bump her with Mr Le Roux. Mr Hamilton confirmed in writing that the position of a general manager was not available. Mr Hamilton testified that he explained why the position of general manager was not available. The applicant had never worked as a general manager. Mr Hamilton testified that Mr Le Roux could not be retrenched to make way for the applicant for the reason that he had the same period of six years' service as the applicant. Mr Le Roux also had two years' experience as a general

manager. The applicant did not have this experience. The other reason given was that it was the applicant's department that was under consideration and not that of Mr Le Roux who was employed at another hotel, at Protea Hotel, Capital. It was therefore impractical to retrench Mr Le Roux to accommodate the applicant when both had the same period of service. Full reasons were set out in a letter dated 18 January 2000 addressed to the applicant.

The applicant rejected the offers given to her. She was asked to review her rejection of the offers. The applicant then set out her conditions for accepting the take-over of the restaurant. She wanted -

(a) a walk-in fridge to be installed;

(b) that respondent deal with existing staff as she wanted to employ her own staff;

(c) that the walls and the roof be done;

(d) that all chairs be the same.

These conditions were of a cost nature and were not accepted by the company. The company however agreed to repair what needed to be repaired, but was not prepared to change the chairs. The applicant did not accept the offer.

On 24 January 2000 a suggestion was made to the

applicant to take over the restaurant on a 3-month trial basis. It was also pointed out that the respondent was not prepared to spend about R25 000 on chairs. The respondent could not agree that the restaurant staff be retrenched. The applicant refused to take the restaurant on a trial basis, and insisted she wanted the position occupied by Mr Le Roux. Mr Hamilton pointed out that the process of consultation would be concluded on 25 January 2000. There was a consultation on 25 January 2000. The applicant did not raise anything. On 26 January 2000 a notice of termination of service was addressed to the applicant. The notice informed her that the last date would be 29 February 2000.

The applicant then addressed a letter to Mr Hamilton and stated that she did not refuse the offer of taking over the restaurant. She mentioned that the offer of restaurant manageress was not made in good faith. She further raised the fact that she was not consulted on the severance package.

Mr Hamilton explained in a letter dated 28 January 2000 that a severance package was discussed with the applicant. Mr Hamilton further testified that they did not want to retrench the applicant. He testified that they continued to look for alternatives. They managed to place all other employees

within the company. None of the employees disputed their retrenchment.

On 3 February 2000 the applicant wanted the financial statement of the Boulevard Hotel Group. Mr Hamilton responded by letter of 7 February, and explained that the financial statements of the group was not relevant. This was so because it was only the banqueting section that was affected and not the group as a whole. Other accounts required by the applicant were furnished.

On 13 February 2000 the applicant raised the issue of timing of the dismissal, the method of selection and severance pay. She insisted she was available for consultation "only in writing".

Mr Hamilton testified that the issues raised in the letter of 13 February were never raised before. These issues were discussed. According to Mr Hamilton the discussions with the applicant were initially friendly but her attitude changed later. The negotiations continued for six weeks.

Under cross-examination Mr Hamilton testified that he became aware in mid-1999 that the banqueting section was not making a profit. He realised that keeping the banqueting section was not viable. There was a downturn in the market. A

decision to close the banqueting section was only taken in January 2000. It was discussed with the employees in a meeting. There were also discussions with the unions. Mr Hamilton conceded that part of the banqueting section was out-sourced to Adler Cousine. The respondent received 10% of the profits. He however testified that the banqueting section was running at a loss.

It was suggested to Mr Hamilton that he could have kept the applicant in her previous position as a restaurant manager at the same salary. He however testified that he believed that the alternatives would be taken by the applicant.

In response to a question that Mr Hamilton brought in his son to earn R3 000 for looking at the files. He stated that his son was doing human resources. He asked the applicant to come up with alternatives but she did not. He denied that he did not consult properly. He testified that the applicant declined the management position, which was available prior to the dismissal. Mr Hamilton denied that the reason the applicant was turned down was family responsibility. He considered that the applicant could have been trained for a couple of months to fill the position of a general manager. Discussions were held with the applicant to apply for available

positions.

Mr Hamilton testified further that the restructuring was merely to contain costs. The closing of the banqueting section was a huge saving. He believed that the correct process was followed in the retrenchment of the applicant. He denied that the options given to the applicant were not viable. He further mentioned that Mr Le Roux was later retrenched and his position was not filled. There was no suitable position after the applicant had left.

Mr Vivier testified for the respondent as well. He confirmed the rationale for the restructuring. He testified that the preparation of food in the banqueting section was out-sourced to Adler Cousine to cut down costs. He believed that the restaurant was a viable option for the applicant. He further confirmed that the applicant did not dispute the restructuring. The applicant was informed that her position might be affected. He denied that the applicant got information of redundancy only on 26 January 2000. By giving the restaurant to her the Company was giving her an opportunity. The respondent was going to get rent. The applicant did not make counter proposals. She also did not accept a drop in salary. He denied that the consultations were not in good faith. Mr Vivier

confirmed most of the evidence given by Mr Hamilton. Like Mr Hamilton, he did not deviate from his evidence. There is not much of importance that came under cross-examination. I find both Mr Hamilton and Mr Vivier to be reliable witnesses.

The applicant also gave evidence. She testified that she was employed by the respondent from August 1994 to 29 February 2000. She testified that before her dismissal there were discussions regarding the restructuring as a result of the downturn in business. The whole hotel had the downturn. She was on management level. She was employed as a restaurant manager, and took on duties of banqueting over and above her duties. She had to concentrate on the restaurant duties, banqueting and do secretarial work. She conceded that the banqueting section was at risk, but it never occurred to her that she would be retrenched because she was employed as a restaurant manager. She discussed the restructuring, but the letter terminating her services came as a shock. She complained about lack of consultation and that decisions were unilaterally taken. She did not discuss the severance pay with the respondent. She further testified that the discussions were in regard to the restructuring. She was never told that the manager of the restaurant, as well as the secretary for general

manager, would be redundant.

The applicant testified further that the alternatives discussed were for restructuring not for retrenchment. She denied that she rejected the offer of the restaurant. She stated that the respondent rejected her proposals. She could not accept the position of being the secretary of the general manager at a lower salary when she was earning R8 000 per month. She denied that all the financial statements were made available to her. She could only make a counterproposal on receipt of financial statements. She further testified that if the banqueting section was closed she still had the management of the kitchen and the secretarial duties.

Under cross-examination the applicant denied that she only disputed severance payment. She conceded that severance payment was put in the letter of 14 January 2000, but it was not discussed. She conceded that every day she was called for a discussion, but she was never told that she would be retrenched. She further testified that they talked about the restructuring and retrenchment in the banqueting section.

It was put to her that throughout all the letters written there were alternatives discussed. She conceded that she was asked to take over the restaurant business. She questioned

the reduction in her salary. She wanted to have the general manager's position because of her experience. She was never told that she had lost the restaurant manager's position. She conceded that before 14 January 2000 there were discussions regarding the closure of the banqueting section. This was done to save costs. She did not see this as a threat to her. She further conceded that the position of a general manager was senior, and that Mr Le Roux had been a general manager at Phalaborwa and had experience. She however stated that Mr Le Roux was afforded an opportunity, which was not given to her. She was involved in business and marketing plans with Mr Vivier. She did not have experience in budgeting. She agreed that she rejected the position of being the restaurant and kitchen manager.

Applicant further testified that she did not have experience in dealing with equities and salary negotiations, she however had experience in training. Mr Hamilton Jnr took some of the duties she was doing. She however conceded that Mr Hamilton dealt with the staff for the whole group. She did not recall being made an offer at Hatfield. She denied that the Commercial Workers' Union of South Africa (CUSA) ever acted for her, as recorded in the letter from CUSA dated 3 March

2000, and addressed to the company.

This is difficult to accept for the reason that the union would not have known that a general manager's position was offered to the applicant at Hatfield. They would not have known that a position in Witbank had been offered to Mr van Heerden. The union would also not have known that the applicant was offered the restaurant to take over. The union also would not have known that Mr Keith Hamilton was employed by the respondent. The union went further to suggest a meeting for negotiations.

The applicant submitted that there was no need to retrench her for the reason that the closure of the banqueting section only affected part of her duties. The applicant did not dispute that there was a rationale for the closure of the banqueting section of the hotel. She conceded that her retrenchment in the banqueting section was for the purposes of saving costs. The applicant was involved in the restructuring of the banqueting section. She did not dispute the evidence of Vivier, in that 60% of her duties fell in the banqueting section. Although the applicant was employed as a restaurant manager, her duties shifted to that of the banqueting manager. The two sections of the hotel were managed by the

applicant. This was the reason why she was affected. Her salary accommodated the two sections she was managing. If there was no problem with the restaurant and the banqueting sections there would not have been a need for the respondent to out-source a certain function.

The fact that the applicant was a restaurant manager does not in my view assist her when it is not disputed that 60% of her time was devoted to the banqueting section.

The applicant submitted that she was dismissed in order to accommodate Mr Keith Hamilton. The evidence, which is undisputed, is that Keith Hamilton only dealt with human resources for the whole group. His salary therefore came from the group and not from the respondent.

Although it is not disputed that the applicant performed some of the human resources duties, this cannot be compared with those of Mr Hamilton. Mr Hamilton did not become the restaurant manager. There is no evidence that her retrenchment was a smoke screen done in bad faith. On the other hand, there is evidence to show that the whole hotel had a downturn. This was the evidence given by the respondent and confirmed by the applicant.

The applicant submitted that it did not occur to her that

her position was going to be redundant.

The applicant was in a managerial position. The restructuring was discussed with her. The confirmation appears in the correspondence between the applicant and Mr D Hamilton. The letter dated 14 January 2000, addressed to the applicant, indicates that the applicant was aware that her position was at risk. I quote the contents of paragraph 3 of this letter in full:

"As a result of Adler Cousine's reluctance to take over the entire operations, as stated, accordingly the following proposals were tabled with you:

1. That you look closely at renting the existing restaurant and kitchen from us, fully equipped as is, as a going concern for your own profit. In this agreement you would be required to take over all the relevant staff in the restaurant and kitchen. We will help and advise you in this matter.
2. That you resume duties as our restaurant and kitchen manager as from 1 March 2000 on a gross salary of R5 000, with an additional performance bonus linked to the strict control of all costs. Please note that the only other position being envisaged is that of general manager's secretary at plus/ minus R2 500 per month.

3. As previously discussed, in the event of neither option 1 or 2 being accepted, in the absence of any further alternatives, then severance payment will be made to you in accordance with the Labour Relations Act. In addition a further 2-weeks' salary will be paid to you as a gesture of goodwill from the directors of the Hotel Boulevard in lieu of the valued service rendered by you over the many years."

The applicant does not dispute receipt of this letter, and correctly too. If applicant was not aware that her position was made redundant, the first reaction would have been for her to ask why these proposals were made. She would have questioned why it was proposed that she could resume the duties as a restaurant and kitchen manager as from 1 March 2000 at a salary of R5 000. This proposal should have rung a bell on the applicant. She was also offered the position of the manager's secretary. This sudden change of attitude should have been questioned by the applicant. Unfortunately for the applicant she was told in this letter that if the first two options were not accepted, she was going to be given severance payment. The applicant should know, as a manager, that severance payment is only made on retrenchment. She never raised a query about this. I fail to understand why she would

be paid severance pay if she was not affected. The applicant never explained this in her evidence in chief.

The applicant, however, in her letter of 17 January 2000, addressed to Mr Hamilton, dealt with the question of retrenchment of Mr Le Roux in order for her to get the position of general manager. She points out that she was not satisfied with the reasons given by Mr Hamilton's refusal to give her the position. She answered the letter by stating that:

"You are not consulting with me in good faith."

The applicant does not explain why she wanted Mr Le Roux to be retrenched if she had no knowledge that her position was redundant. Mr Le Roux was not working in the banqueting section. His retrenchment could only occur if she was bumped with him. The bumping could only be done in the event of a retrenchment. The applicant failed to explain what consultations she was referring to in this letter. In my view these were consultations relating to the saving of her job.

It is clear from the correspondence emanating from the applicant that she was interested in getting the position of the general manager. The respondent pointed out why she could not be appointed to that position. It is the prerogative of the employer as to who should be appointed in a managerial

position. In doing so the skill and competency of the person to be appointed is important. If the employer were to fail to retain skill the business will go down. The employee has no right to claim to be appointed to a particular position, and that the incumbent should be retrenched. It is not unfair for the employer to retain a person best suited for the position. In the present case Mr Le Roux had the same period of service as the applicant. He also had experience as a general manager, which applicant did not have.

Further to the above, if the applicant's version is to be believed and accepted, that she was not aware of her retrenchment, her letter of 19 January 2000 said the opposite. In the third paragraph of this letter the applicant stated the following:

"Furthermore, you said this morning that you were going ahead with the retrenchments. This was not stated in the letter, but again refers to the two said retrenchments."

This is evidence of the fact that the applicant was aware of her position. After the applicant was served with the letter of her termination, dated 26 January, she never questioned the rationale for her retrenchment. She raised the fact that she did not refuse the alternatives of the restaurant. She further

indicated that the position of being the restaurant manageress was not in good faith. For the first time she indicated that the decision about the severance package was unilateral. She wanted the respondent to give details why this decision was made. This in my view, enough evidence of the knowledge of the retrenchment by the applicant. It was only on 3 February 2000 that applicant took issue with the drastic downturn in revenue and wanted the financial statement of the group. Those documents were never requested during the period of consultations. The respondent gave the applicant the documents necessary for her to make up her mind.

It is common cause that other employees were accommodated within the hotel. It is the applicant who could not be accommodated as a result of her refusal to take one of the options open to her. The applicant was engaged in discussions with management and was aware of the pending dismissals. For this reason I reject the submission that no notice was given to the applicant that she could be dismissed. I also reject the submission that the respondent did not identify the affected employees.

In view of what is stated above I have come to the conclusion that the retrenchment was discussed with the

applicant. In *Visser v Sanlam* (2001) 22 ILJ 666 (LAC), at 671, para.19 the court stated that:

"Consultation as envisaged in section 189(2) is a continuous process between the parties."

It is clear from the evidence that numerous correspondence was exchanged between the parties in an attempt to reach consensus on alternatives. The applicant was not an ordinary employee. She never made her own proposals. She could not have made any mistake about the consultations. To plead ignorance about the retrenchment casts doubts about her account of events. She wants the court to believe that she was only informed on 26 January about her position being redundant when she was afforded adequate opportunity to discuss alternatives.

It was conceded by Mr Geldenhuys, for the applicant, that there were lots of meetings with the applicant. It is acceptable that it is the duty of the employer to take initiative regarding the consultation. The employee is also obliged to engage adequately in the consultation process. The process involves a bilateral process which imposes an obligation on both parties to consult in good faith.

It was submitted on behalf of the applicant that the

correspondence was window-dressing. No reasons were suggested for this. The applicant also engaged in correspondence.

Mr Hamilton testified that the letters correctly reflected what was discussed. This was not disputed by the applicant. It is common cause that the decision to close down the banqueting section was taken. It does not follow that a decision to retrench the applicant was taken at the time when the decision to close down the banqueting section was taken. The respondent engaged the applicant in consultations, where proposals were made to avoid retrenchment. Although the applicant indicated that she did not refuse the offer of the restaurant, she did not accept it either. She did not give any explanation why she wanted the chairs to be the same, and why she wanted to employ her own staff.

It was argued that the figures requested were not given to her. It must be noted that the request was made after the letter of termination. These documents were handed to the applicant. In the applicant's letter dated 8 April 2000 she recorded the following:

"The documents handed to me today were not given to me initially and are relevant to the restaurant."

In the light of this I reject the suggestion that the information was not given.

It was submitted on behalf of the applicant that the alternatives were not considered. I reject this proposition for the reason that the applicant was given several options but she rejected them. She however insisted that she wanted nothing else but the position occupied by Mr Le Roux. The applicant failed to raise any proposals.

The applicant further submitted that the figures in the financial statement were low because of out-sourcing. That may be correct, but it does not preclude the employer from restructuring the business. The applicant has conceded that there was a downturn in the business. It is highly unlikely that the retrenchment was not discussed, as she would want the court to believe.

I am satisfied that there was operational rationale for the closure of the banqueting section, and that of the retrenchment of the applicant. I am further satisfied that the consultation took place in January. The applicant did not question what was going on. There would not have been any reason for her to demand the position occupied by Mr Le Roux if this was not in the context of the consultations regarding

retrenchment. The applicant was in a managerial position and cannot claim to be ignorant of what was going on.

In order for the employer to satisfy the provisions of section 189 of the Labour Relations Act it does not have to follow a check list, substantial compliance would be enough. In the present case the applicant was given enough opportunity to engage the employer and make her own proposals.

I am therefore satisfied that the dismissal was both substantively and procedurally fair. I have considered the question of costs, but came to the conclusion that it would be fair in the circumstances of this case that I award no costs. I do so because the applicant strongly believed that she should not have been redundant. The conduct of her case in my view does not warrant an order for costs. In the circumstances I have exercised my discretion in not awarding the costs.

O R D E R

The order that I make therefore is the following:

(a) The dismissal of the applicant was fair.

(b) The applicant's application is dismissed.

(c) There is no order for costs.

ON BEHALF OF THE APPLICANT: ADV GELDENHUYS