

**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

**Case no: JR803/18**

In the matter between

**MTN (PTY) LTD**

**Applicant**

and

**COMMISSION FOR CONCILIATION,  
MEDIATION AND ARBITRATION**

**First Respondent**

**COMMISSIONER: ERIC MYHILL N.O**

**Second Respondent**

**DHIRESHEN DUSHEN NAIDOO**

**Third Respondent**

**Heard: 14 May 2019**

**Delivered: 14 June 2019**

**Summary: Unopposed application for review in terms of section 145 of the Labour Relations Act, 66 of 1995 – test for review restated - transfer of employee constitutes a demotion if status is diminished even if remuneration is not affected – failure to consult with an employee prior to taking the decision to transfer is procedurally unfair – application dismissed.**

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**JUDGMENT**

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**NIEUWOUDT, AJ**

[1] This is an unopposed application to review and set aside or alternatively substitute the arbitration award under case number GAJB17783-17, handed down by the second respondent on 19 March 2018.

### Background Facts

[2] It suffices for the purpose of the application to record a few facts.

[3] The applicant employed the third respondent in various capacities at various places. Salient to this application is his employment as a Store Supervisor at the Morningside branch. The third respondent was employed at Morningside in order to reduce stock losses. He testified that by the time he had left Morningside, the stock losses had dropped from R3,5 million to R1 200. (The period of measurement was not disclosed.) This is a significant improvement. This was not challenged under cross examination.

[4] Despite this, there was a Business Risk Management report that was critical of the applicant and others.

[5] This report led to the applicant's Mr Monadira, a regional manager, deciding that the third respondent and his fellow supervisors at Morningside should be transferred. Mr Mans called the third respondent and his fellow supervisors to an informal meeting on 6 May 2017. The third respondent testified that they were called in by Mr Mans and told that they were being moved. The reason for the move was due to the shrinkage at Morningside. The third respondent chose Rosebank as the branch to which he would move. There was no consultation at the meeting, a point that he stressed at a later meeting with Mr Monadira.

[6] The third respondent's evidence was that the commission portion of his remuneration was impacted severely by the move. He stated that in the last month of employment, he was paid approximately R3 000 when Rosebank made target whereas his commission would have been approximately R30 000 if Morningside made target. This fact was not disputed under cross examination. However, the applicant stressed the fact that the third respondent should have been able to grow his commission over a period of

time and that Rosebank has the same turnover potential as Morningside. It also contended that he was on sick leave for a period and could accordingly not exploit the potential of the Rosebank store.

- [7] The third respondent resigned and his last day of employment was 30 October 2017.

#### The award

- [8] The second respondent delivered a lengthy award of 30 pages. On the face of it, the award is well reasoned.
- [9] The second respondent found that the transfer of the third respondent amounted to a demotion despite the fact that he retained his title and his conditions of employment. The reason for this finding is that the transfer constituted a diminution in status, importance, prestige and responsibility of the applicant as the store in Rosebank was a lot smaller than the store in Morningside. (Although the second respondent did not refer to it, the reduction in the third respondent's remuneration.) He also found that the transfer was not preceded by consultation.
- [10] Accordingly, so the second respondent found, the third respondent was entitled to relief and that such relief had to be calculated on the amount that the third respondent had been paid prior to the transfer.
- [11] He awarded 3 months' compensation in the amount of R229 991.15 to the third respondent.

#### The grounds of review

- [12] In its founding affidavit, the applicant contended that the award was not one that a reasonable commissioner could reach. In its supplementary affidavit, it contended that the second respondent also committed a gross irregularity in the conduct of the proceedings.
- [13] As far as the test on review is concerned, the Court needs do no more than refer to the decision in *Herholdt v Nedbank Ltd (Congress of SA Trade Unions*

as *Amicus Curiae*)<sup>1</sup>. The test on review is by now trite and it is not necessary for the purposes of this decision to revisit it.

### Consultation

[14] It is convenient to first deal with the issue of consultation. The applicant contended that Mr Mans consulted with the third respondent on 6 May 2017. This contention is, quite frankly, without substance. The third respondent pertinently stated in his testimony that the meeting in May did not constitute consultation, a fact which he recorded at the later meeting in July. This aspect was not challenged under cross examination. Mr Matyolo, for the applicant, submitted that the fact that the third respondent had conceded that Mr Mans had consulted with him and his fellow supervisors in May, meant that consultation did occur. The submission loses sight of the fact that an erroneous concession in the witness box, does not bind a party. It also loses sight of the fact that Mr Mans testified in chief that Mr Monadira had stated at the meeting in July that he would stick to his decision to move the Store Supervisors. This confirms that the decision had been taken prior to the meeting in July.

[15] Mr Matyolo was then constrained to submit that where an employer was contractually entitled to transfer employees, consultation was not required; it was only necessary for the employer to explain why the transfer was implemented. He was unable to refer the Court to any authority in this regard.

[16] In *Riverview Manor (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*<sup>2</sup>, the Labour Court said the following at paragraph 24:

‘The resignation of an employee in the face of a transfer of employment from Cape Town to Johannesburg amounted to constructive dismissal in *Howell v International Bank of Johannesburg* (1990) 11 ILJ 791 (IC) because -

- (a) the period allowed the employee to respond to the employer's proposal was totally unreasonable, in the light of the employee's personal circumstances;

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<sup>1</sup> (2013) 34 ILJ 2795 (SCA), and more particularly to paras 12 and 25 thereof

<sup>2</sup> (2003) 24 ILJ 2196 (LC).

(b) the employer had a positive duty at least to consult with the applicant about his transfer before taking a final decision.'

[17] The employer in *Howell*<sup>3</sup> was contractually entitled to transfer Mr Howell.

[18] The requirement to consult is even more applicable when the transfer constitutes a demotion. Although the fact that the third respondent could elect the store to which he wished to go indicate that there was limited consultation, but this did not extend to the decision to transfer. It was thus unfair for the applicant not to consult with the third respondent prior to taking the decision to transfer him.

### Demotion

[19] The second respondent referred to a passage in *Solidarity on behalf of Kerns v Mudau NO and Others* <sup>4</sup> in his award (without expressly referring to the decision itself). This passage reads:

'In *van der Riet v Leisure Net t/a Health & Racquet Club* [1998] 5 BLLR 471 (LAC), it was held that, 'failure to consult with an employee in a non-disciplinary demotion is an unfair labour practice'. In *Du Toit & E others Labour Relations Law* (4 ed at 465) the learned authors state that: 'In law demotion could also mean a reduction or diminution of dignity, importance, responsibility, power or status even if salary, attendant benefits and rank are retained'.

[20] In *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services and Others* <sup>5</sup> the LAC said the following:

'I agree with counsel for the appellant that the mere fact that the appellant's rank and remuneration were not going to change does not mean that the transfer to Pollsmoor could not or did not constitute a demotion. I agree, too, that the status, prestige and responsibilities of the position are relevant to the determination of whether or not a transfer in a particular case constitutes a demotion. As can be seen above, the appellant in this case has set out in

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<sup>3</sup> Ibid n 3.

<sup>4</sup> (2007) 28 ILJ 1146 (LC) at para 39

<sup>5</sup> (2008) 29 ILJ 2708 (LAC) at para 88

great detail a number of matters which go to the status, prestige and responsibilities of his then position and the position he was to occupy in Pollsmoor. Largely, the respondents have not challenged the appellant's version on many aspects of his evidence in this regard. All of these have been referred to above. In the light of the largely uncontradicted evidence that the appellant has adduced in regard to the status, prestige and responsibilities of his position in Cape Town, I have no hesitation in concluding that such position was of a higher status, prestige and responsibilities than the position he was to occupy in Pollsmoor. That being the case, I also have no hesitation in concluding that the appellant's transfer to Pollsmoor constituted a demotion.'

- [21] Accordingly, there is clear authority for the finding by the second respondent that a diminution in status, importance, prestige and responsibility constitutes a demotion and this finding is not one that a reasonable commissioner could not make.
- [22] Mr Matyolo contended that the post to which the third respondent had been transferred in Rosebank was not (to use a neutral phrase) inferior to the post that the applicant had occupied at Morningside. He relied on the fact that Rosebank catered for the same Living Standard Measure group as Morningside. This means, broadly speaking, that the patrons at both stores have the same purchasing power. He also relied on the fact that the unchallenged evidence before the second respondent was that the third respondent would have been able to build up his commission earnings over a period of time to match that of Morningside.
- [23] It was not disputed that Morningside was a bigger store, with more salespeople in its employ, than Rosebank. The applicant tried to avoid the obvious consequences of this fact by stressing the growth potential of the Rosebank store. Future potential can however not impact on current status.
- [24] Accordingly, the second respondent's decision that the third respondent had been demoted, was not a decision that no reasonable commissioner could have reached.

### The test for unfair labour practice

[25] Mr Matyolo referred the Court to a number of decisions in support of the contention that the second respondent ought only to have found that an unfair labour practice had been committed if the conduct of the applicant was motivated by arbitrariness, *mala fides*, capricious conduct or a discriminating management policy. However, none of these cases dealt with a demotion and they are thus not in point. *Solidarity obo Oelofse v Armscor (SOC) Ltd and Others*<sup>6</sup> dealt with the inconsistent application of discipline, *Ncane v Lyster NO and Others*<sup>7</sup> dealt with the suitability of an applicant for promotion, *City of Cape Town v SA Local Government Bargaining Council and Others*<sup>8</sup> dealt with the termination of a motor-vehicle benefit and *Aucamp v SA Revenue Service*<sup>9</sup> dealt with participation in a performance management and development system.

### Substantive fairness

[26] The applicant relied on the fact that it was contractually entitled to transfer the third respondent and that its operational requirements justified the transfer. The second respondent did not decide the issue of the justification for the transfer due to the fact that there was no evidence, save for the reference to the BRM report, to justify the transfer. The mere say-so of an employer can never be justification for its conduct.

### Conclusion

[27] The applicant did not make out a case for review and the application falls to be dismissed.

[28] In the premises, I make the following order:

### Order

1. The application is dismissed.

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<sup>6</sup> (JR2004/15) [2018] ZALCJHB 87 (21 February 2018) at para 51

<sup>7</sup> (2017) 38 ILJ 907 (LAC) at para 25

<sup>8</sup> (2014) 35 ILJ 163 (LC) at para 24

<sup>9</sup> (2014) 35 ILJ 1217 (LC), no para reference

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**Hermann Nieuwoudt**

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Adv D X Matyolo

Instructed by: Werkmans Attorneys

LABOUR COURT