IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 1087/12

IN THE MATTER BETWEEN:

JOHANNES MKHWANAZI	**First Applicant**
ALBERT NKOSI	**Second Applicant**

And

UNITRANS SUPPLY CHAIN SOLUTIONS (PTY) LTD	**Respondent**

Heard: **23 to 25 March 2022, and 02 April 2022**[1]

Delivered: **27 July 2022**

JUDGMENT

MABASO, AJ

Introduction:

[1] In these proceedings, by the end of the trial, it transpired that the claim ultimately boiled down to whether Messrs Johannes Mkhwanazi and Albert Nkosi (the Applicants) unreasonably refused to accept an offer of alternative employment that Unitrans Supply Chain Solutions (Pty) Ltd (the Respondent) offered, consequently, are not entitled to reinstatement or severance pay? This question is intractably linked to whether the offer by the Respondent was reasonable.

[1] Date of filling of the heads of argument.

[2] It is common cause that the Applicants were employed by the Respondent and were based in Newcastle, in the province of KwaZulu-Natal, and were fulfilling the Respondent's obligations with African Amines (the Client) and that the contract between the Respondent and the Client terminated on 30 June 2012. Consequently, the Applicants had no work to do in Newcastle.[2] The Respondent offered the Applicants alternative positions on a different contract. The crux of this dispute lies here, as most of the issues are either common cause or undisputed.

[3] As a result of the dismissal, in November 2012, the Applicants approached this Court seeking an order that their dismissal based on operational requirements be declared unfair. The Respondent opposed this action and raised some technical points, which were argued before this Court (the Order), a different judge, which upheld one point *in limine*. Later both parties, by agreement, successfully approached this Court, indicating that the Order was being abandoned, which I duly endorsed the file. Thereafter, the matter was set down for trial to determine the merits of the dispute.

Ruling on the objections*:*

[4] Counsel for the Respondent raised objections relating to a certain line of examination in chief, advanced by the Applicants Counsel, relating to the assertion that previously the Applicants were transferred to different contracts without reduced rates, as Respondent's Counsel had contended that such assertions were not part of the Applicants pleaded case. I allowed the questions and indicated I would incorporate the reasons for permitting the questions thereof herein.

[5] After adequately looking at the Bundle of documents[3] filed in this matter, it is clear that those questions were part of the Applicants case from the beginning, as even during the meetings as reflected in the common cause minutes that the issue was ventilated; therefore, the questions by the Applicants' Counsel were in line with the Applicants case. I must also add that the Respondent's Counsel corrected

[2]This Municipality, by June 2012, had an unemployment rate estimated at 37.4 %, according to Newcastle Municipality Integrated Plan 2012 to 2014 issued in May 2014. The information on Newcastle Municipality's website was visited on 25 July 2022.
[3] P24 and 39.4 of the Bundle of documents.

himself during cross-examination of the Second Applicant as he asked about the same issues.

Background and parts of the *viva voce* evidence:

[6] The Applicants were dismissed by the Respondent on 28 September 2012. The process leading to the dismissal was thus: On or about 16 May 2012, the Respondent was apprised that its contract with the Client would be terminated by 30 June 2020, in the event that it was not a successful bidder for the new contract as a transport contractor. On the same day, the Respondent consulted with three drivers, including the Applicants, wherein all three employees were informed of this uncertainty. The Applicants and Respondent held subsequent meetings on 25 May 2012, 15 June 2012, 18 June 2012 and 25 June 2012. On 06 June 2012, the Respondent issued a section 189(3) notice to all affected employees, including the Applicants. Ultimately, the contract with the Client ended on 30 June 2012, as the Respondent's tender was unsuccessful.

[7] Despite this adversity, the Respondent, on its own accord, held the view that neither of its employees should be retrenched as it had alternative truck drivers' positions in Johannesburg, Gauteng, under a different contract; so it is apparent that during the consultation process the Respondent had offered the Applicants the alternative employment in the following terms:

(a) a once-off relocation allowance;

(b) that their hourly rates were to be R36. 80 from R38.70. In the meeting on 20 September 2012, the Respondent explained to the Applicants that the likely monthly loss was between R270 and R300 on their basic salary;

(c) in addition to these two, above, Mr Raymond Ismail (Mr Ismail), for the Respondent, testified that the Applicants were to be provided accommodation at the Respondent's depot free of charge for three months so that they could settle down; and

(d) Mr Ismail's evidence also indicates that if the Applicants had accepted the reduced rates, about six months later, their salaries were to be more than R38.70, which was to be about R40.00.

[8] One of the employees, Mr Mthethwa, accepted a reduced rate and was accordingly transferred to the new position. During the trial, it transpired that Mr Mthethwa was not the only one who accepted it, but even others, as was stated by Mr Ismail for the Respondent, who had stated during his evidence that "others accepted the offer".

[9] According to the pre-trial minutes, it is common cause that the Respondent offered the Applicants alternative employment. However, the latter "did not accept the offer of the contract with a reduced hourly rate". Following further engagements, post the Client's contract being terminated, on 10 September 2012, the Applicants signed the employment contracts but disputed the rate of pay of R36.80. The Respondent informed the Applicants that the offered rate pay was, in fact, what was "*being paid by that contract, and the Company was unable to pay the employees any more than that rate*.[4] However, the Applicants advised the Respondent that they would be satisfied should the latter retrench them with severance packages and thereafter re-employ them in the new positions.

[10] On 12 September 2012, the Respondent advised the Applicants that it was not prepared to accept the contracts because the Applicants were not willing to accept the rates. It is prudent also to indicate at this juncture that in terms of the contracts offered to the Applicants at the end it provides that *"Kindly confirm your acceptance of this appointment under the aforementioned terms and conditions of service…"*; and in the meeting of 05 July 2012 attended by the Respondent, the Applicants, and the union official, the issue of the rates, was again discussed wherein the Applicants said:

> *"…are not willing to compromise their stance, they earned their wages through wage negotiations over the years and [the Respondent] decided to*

[4] Bundle of documents, p 39.2 (a letter written by the Second Applicant).

place them ***<u>on the other contract that they did not ask for</u>***, *now their rates are affected*" (own emphasis)

[11] During cross-examination, when the Second Applicant was being cross-examined concerning why they were not willing to accept the positions at the reduced rates, they confirmed that their concern was advanced during the consultations, as per the agreed minutes, was the fact that the collective agreement had fixed the rates. The Second Respondent confirmed they were due for an annual increase the following year (2013). [5]The Applicants indicated that they had a meeting with their family members whereby a decision was made that they should not move to Johannesburg as he said in *IsiZulu*: "we should rather die at home than at the distance".[6]

<u>The law and analysis:</u>

[12] At the commencement of an employment relationship, both employer and employee will have to agree on the terms and conditions of such relationship, and this will include *inter alia* the position to be occupied, remuneration to be paid, period of the contract (either fixed-term or permanent). In short, a meeting of the minds is required, giving rise to enforceable obligations. Same when it is time to vary the same terms and conditions, parties must understand each other and reach an agreement.

[13] Suppose a contract of employment is permanent, then statutory: in that case, it may be terminated by an employer, either based on the employee's misconduct or for the employee's omission (where he cannot perform according to the expected and/or agreed standard) or sometimes such contract may be terminated based on a "no-fault situation" (meaning the circumstances beyond either party's control, that is the operational requirements of an employer). If the reason is for the latter, an employer is expected to meet certain statutory obligations: including *inter alia* to pay such employees severance payment.

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[5] Confirmed by p 39.4 of the Bundle of documents.
[6] Direct translation.

[14] The severance pay is subject to the employees not unreasonably refusing to accept alternative employment; as contemplated in section 41(4) of the BCEA, which provides that:

> *"An employee who unreasonably refuses to accept the employer's offer of alternative employment with that employer or any other employer, is not entitled to severance pay in terms of subsection (2)."*

[15] The BCEA says severance payment must be paid to a dismissed employee if such a dismissal was sanctioned because of operational requirements. The same statute does not explicitly prescribe that an employer must offer alternative employment; this is at the discretion of such an employer, depending on availability. However, should such an employer decide to offer alternative employment, case law calls that such alternative employment should be reasonable, and I concur with that case law. Once offered, the offered employee shall not unreasonably refuse it; if he does and later dismissed, then a presiding officer may be required to do an injury relating to this aspect. *Cf. Molapo Technology (Pty) Ltd v Schreuder & Others* (2002) 23 ILJ 2031 (LAC) at paras 24- 29, and 34.

[16] Once an employer has offered the alternative employment to the employee, it, therefore subsequent thereto, has no duty to convince the employee to accept the offer, as the Labour Appeal Court (LAC), per learned Willis JA, in *L & C Steinmuller (Africa) Ltd & Others v Shepherd* (2005) 26 ILJ 2359 (LAC) said the following:

> *"In my opinion, there were meaningful consultations, on several occasions, both after the employee was made the offer and after he rejected it and made counter-proposals. I do not see what more could reasonably have been expected of the appellants. Neither in law nor in fairness is there is any obligation that rests upon an employer who offers an employee alternative employment in order to avoid retrenchment to make an effort to convince the employee to accept the alternative offer. This is the position both under the old Act and the LRA. In the circumstances of the present case, the notion is ridiculous*."[Own emphasis]

[17] In *Fresh Market Pty Ltd v SA De Klerk* 2000 21 ILJ 356 LAC at para 10, the Court gave the following guidance as to what should be considered in relation to reasonableness:

> *"Third, was her refusal unreasonable? I have already adverted to the fact that an employee is entitled to decline an offer of alternative employment if it is reasonable for an employee to do so. What is reasonable or unreasonable will depend upon the facts. Du Toit The Labour Relations Act of 1995 at 406 has the following to say about this: 'What amounts to an unreasonable refusal will depend on the circumstances. It is submitted that the Court should have regard to the remuneration offered, the change in status and functions, the possibility of continued job security, and the employee's personal circumstances and family situation.* '[Own emphasis]

[18] Twenty years later, the LAC amplifying this position, in *Lawley v CCMA and others* 2020 41 ILJ 1339 (LAC) at para 13 said the following:

> *"…There are compelling reasons why the legislature saw fit to limit the payment of severance pay in this manner. Not only does it incentivise an employer to provide alternative employment, but it also seeks to limit job losses on reduction..."* [Own emphasis]

[19] In *Astrapak Manufacturing Holdings (Pty) Ltd t/a East Rand Plastics v Chemical Energy Paper Printing Wood & Allied Workers Union* (2014) 35 ILJ 140 (LAC), the LAC commented on the motive for the rejection of the alternative offered and rebuked employees who see an opportunity to want money instead of saving their jobs and said sometimes such employees might lose both the severance payment and the alternative job, as it compressed one of its previous judgment thus:

> "*…: 'What is the mischief that s 41(4) of the BCEA seeks to address or, put differently, what is the purpose of s 41(4)?' In answering this question, Zondo JP found that, where an employer arranged alternative employment for an employee and the employee rejected the alternative employment for no sound reason, but simply in order to take the severance pay, severance pay*

should not be paid to such employee.... In a further analysis of the scope of the section, Zondo JP held that there was no basis by which an employee could obtain both severance pay and alternative employment. There was however a case where the employee would get neither severance pay nor alternative employment:" [Own emphasis]

[20] As indicated in paragraph 15 above, save for what is contained in section 189(3) of the LRA, there was no obligation on the Respondent to offer the Applicants alternative positions The Applicants worked for the Respondent for more than 27 years each. The Respondent faced with no fault situation offered the Applicants available opportunities instead of paying them the severance pay. The contract with the Client ended in June 2012, but the Respondent continued to engage the Applicants for about three months, repeating the same thing: the reduction of the rates. This consultation was in terms of s 189(2) of the LRA, as the Respondent had issued the s 189(3) notice. However, the Applicants' stance was clear that they did not want to accept the alternative employment because of the rates. My view on this score is that the Respondent was generous to a fault in persuading the Applicants, considering they had no obligation to convince them.

[21] Furthermore, looking at the number of consultations held with the Applicants and the type of engagement, clearly, the Respondent fully complied with the provisions of Section 189(2) of the LRA, and the procedure cannot be faulted. In addition to the meetings mentioned in paragraph 6 above, further meetings were held on 02 July 2012, 05 July 2012, 06 August 2012 and 20 September 2012. Even in the evidence before this Court, none of the parties raised concerns about it except the issue of the severance pay. Other employees accepted, specifically Mr Mthethwa, the alternative position offered; what prevented the Applicants was the rates of remuneration. And I deal with this subject hereafter.

[22] As the contract with the Client ended at the end of June 2012, without any doubt, as the Applicants indicated in the meeting of 5 July 2012 that the Respondent offered to take them to a contract that they did not ask for, meaning they were not employed for that contract, which was based in Johannesburg. This means the Respondent provided alternative employment to them, as per *De Klerk's* and

Lawley's above. Without any doubt, the Respondent offered the Johannesburg positions with an aim “to limit job losses on reduction”.

[23] Consequently, the Respondent was trying to save the Applicants from being unemployed, which would have resulted in them not having salaries. The Applicants refused to accept the terms offered to them by the Respondent as they asserted that they could not accept reduced rates, amounting to about R300 per month salary cut; then the reasonable conclusion is that the Applicants preferred to be unemployed, as the Respondent made it clear that was not in favour of retrenchment. This goes against *Lawley's supra*.

[24] The Applicants opted not to have an income. Hence, their respective families starved, all because of a reduction of about R300 monthly. In 2013 they were due to get more than what they were earning in August 2012, as indicated in paragraph 11 above. To me, this does not make sense. Per the evidence of Mr Nkosi, my considered view is that the Applicants wanted money instead of saving their continued employment with the Respondent. I deal more about this hereafter, so the argument that they were willing to work is improbable considering the circumstances.

[25] The Applicants refused to accept the positions unless they were going to get the same rates applicable during the contract with the Client; I am of the view that it was also unreasonable in that the Applicants misconceived the purpose of the alternative employment in that it was to save the employment that was at the brink of termination and the Respondent had no obligation as a result thereof to offer the alternative unless it wanted to assist the Applicants and their respective families in continuing earning an income, which is the case in this matter. Therefore, as much as the Applicants did not ask to be employed in the Johannesburg contract, it is important to remember that what necessitated the Respondent’s conduct was “no fault situation” as neither the latter nor the Applicants caused the contract in Newcastle to be terminated.

[26] At the end of his testimony, Mr Nkosi/the Second Respondent categorically stated that they had a discussion with their families, who advised them that the amount of money that was being offered to them, since it was different from what

they were earning, was unreasonable, and, therefore they should not take the positions; this clearly further confirms that after the Applicants acknowledging that the contract between the Respondent and the Client had ended there were no longer positions for them in Newcastle. So I believe it was unreasonable for the Applicants not to accept the reduced rates to take the Johannesburg positions.

[27] The Respondent stated that the Johannesburg contract was paying lesser rates. Mr Mthethwa accepted lesser rates. Moreover, others too accepted these rates. The Respondent in the meeting of 20 September 2012, summarised thus: the effect of doing this would be to place the contract at risk as all the drivers would demand to be paid at the same rate as the highest paid drivers. The Applicants insisted on getting more rates than others in the Johannesburg contract. The Applicants wanted to be treated differently from others, whilst the Respondent had further indicated that it wanted to apply the parity in that contract.

[28] The Applicant submitted that since the employment contracts were confidential, the other employees would not know. At the same time, the union said they would explain to other employees so there would be no problems. My difficulty with this two-fold explanation is how the union would explain it to others without them knowing the Applicants' rates? Clearly, later the rates of the Applicants were to be disclosed. Furthermore, even if the union was to discuss this issue with its members, what about those who were non-union members or belonged to other unions. Even if the rates were confidential, why should a wrong thing be condoned, in that others earn less whilst the two Applicants earn more? This could have even resulted to strike, as the Respondent indicated in one of the meetings that they were worried about the possible repercussion.

[29] The amount of money being offered to the Applicants was reasonable considering that it was about R300, which is better than no salary. So I conclude that the Respondent offered the Applicants reasonable offers. However, the Applicants opted not to accept because they wanted money in their pockets and thereafter expected to be re-employed by the Respondent. This approach is against the

Astrapak[7] principle above. So, my view is that the Applicants were unreasonable in asking for payment of severance pay thereafter to be re-employed, as this shows that they misapprehended the purpose of section 41(3)_of the BCEA, which is highlighted in paragraph 13 above.

[30] The Applicants further drew the attention of this Court to the LAC's *Oosthuizen v Telkom SA Ltd* (2007) 28 ILJ 2531 (LAC), where it was said a dismissal that could have been avoided constitutes a dismissal that is without a fair reason. As much as this conclusion is the correct position of law as signposted by the LAC, however, this argument loses much of its lustre *in casu*, taking into account that the Applicants are on record confirming that they were only employed for the Client's contract, the Respondent offered alternative employment. However, they insisted on getting the same rate despite being advised that that contract paid different rates.

[31] Further, the Applicant testified that they wanted to be paid, retrenched and thereafter being re-employed, despite being warned by the Respondent as early as 15 June 2012 that it did not want to retrench them and advance a reasonable solution which the Applicants refused. The Applicants were faced with a situation that was to save them their jobs, but they did not accept it, therefore, the Respondent could not be faulted for terminating the employment contracts of the Applicants as it was clear that moving forward there was going to be no meeting of the minds because of the rates.

[32] On the circumstances of this matter, there was a reason for the dismissal of the Applicant, and such dismissal was procedurally fair as the Respondent did all it could to assist the Applicants to save their jobs, but the latter refused; so I conclude that the Respondent did properly consider the Applicants proposal during the retrenchment process.

[33] In the result, the following is ordered:

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[7] *Supra*

Order:

1. The Respondent's dismissal of the Applicant was procedurally and substantively fair.

2. The Applicants are not entitled to severance pay.

3. There is no order is made as to costs.

Sandile Mabaso
Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants:	Mr B. Mgaga, of Garlicke & Bousfield Incorporated
For the Respondent:	Adv. L. Malan SC, instructed by Cliffe Dekker Hofmeyer Incorporated