REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 820/13

In the matter between:

JAN ALEXANDER MYBURGH **Applicant**

and

BARINOR HOLDINGS (PTY) LTD **First Respondent**

BARINOR MANAGEMENT SERVICES (PTY) LTD **Second Respondent**

Heard: **11-13 August; 17 November 2014**
Delivered: **28 January 2015**
Summary: Dismissal for operational requirements

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, Jan Myburgh, was dismissed for operational requirements by the respondent, Barinor[1]. He claims that it was substantively and procedurally unfair.

Background facts

[2] The applicant was appointed as Barinor's financial manager in July 1998 and promoted to financial director in November 2000. In November 2005 he also assumed the title of deputy chief executive officer. Those were his job titles at the time of his dismissal in September 2013.

[3] Towards the end of 2011, Barinor experienced cash flow problems. The company was, as one of its witnesses put it, "asset rich but cash poor". It embarked on a cost-cutting exercise. After obtaining advice from a remuneration consultant, the non-executive directors decided to offer the four senior employees – including the CEO, Mr Boshoff, and the applicant – reduced salaries. In the case of Boshoff and Myburgh that would be alleviated by a substantial bonus if two pending property developments (Driehoek and Door de Kraal) were realised. Although there was some dispute about the exact amounts, it appears that Boshoff would receive 5 to 7 times his annual salary and Myburgh 3 to 5 times his annual salary as a bonus.

[4] The other three employees accepted the restructured remuneration packages. Myburgh did not. Barinor then embarked on a consultation process in terms of section 189 of the Labour Relations Act.[2] Barinor served a notice in terms of s 189(3) of the LRA on Myburgh on 25 January 2013. The consultation process was conducted largely by way of correspondence between the parties' attorneys.

[1]The first respondent is Barinor Holdings (Pty) Ltd. The second respondent is Barinor Management Services (Pty) Ltd. The parties agreed that the employer can simply be referred to as Barinor.

[2] Act 66 of 1995.

[5] The parties could not reach consensus and the applicant was dismissed on three months' notice, effective September 2013. He referred an unfair dismissal dispute to the CCMA and, when conciliation failed, to this court.

Substantive fairness

[6] The applicant admits that there was a need in general to retrench. However, he claims that his dismissal was substantively unfair because Barinor should have accepted either of the two alternative structures that he proposed, namely:

6.1 a combination of the positions of CEO and financial director; or

6.2 the creation of a "junior CEO" position.

[7] The applicant also alleges that his dismissal was substantively unfair because Barinor did not consider him for the position of CEO in the new structure that it implemented.

[8] Following a belated amendment to the statement of claim brought on the day of argument, the applicant also claims that his dismissal was substantively unfair "due to the fact that the reduced salary offered to him is not based on a job description for a job grading exercise".

[9] Mr *Nieuwoudt*, for the applicant, relied heavily on the following *dictum* from *NUMSA v Atlantic Diesel Engines (Pty) Ltd*[3] where the Labour Appeal Court, he suggested, moved away from the so-called 'abstentionist' approach by stating:

> "However, we respectfully differ from their suggestion that the decision to retrench could be fair simply because it is bona fide and made in a businesslike manner. That approach suggests that the court's function is merely to determine whether or not the decision has been correct. What is at stake here is not the correctness or otherwise of the decision to retrench, but the fairness thereof. Fairness in this context goes further than bona fides and the commercial justification for the decision to retrench. It is concerned, first and foremost, with the question whether termination of employment is the only reasonable option in the circumstances."

[3] (1993) 14 *ILJ* 642 (LAC) 648C-D.

[10] He also referred to *CWIU v Algorax (Pty) Ltd*:[4]

> "Sometimes it is said that the court should not be critical of the solution that an employer has decided to employ in order to resolve a problem in its business because it normally will not have the business knowledge or expertise which the employer as a business person may have to deal with problems in the workplace. This is true. However, it is not absolute and should not be taken too far. When either the Labour Court or this Court [the LAC] is seized with a dispute about the fairness of a dismissal, it has to determine the fairness of the dismissal objectively. The question whether the dismissal was fair or not must be answered by the court. The court must not defer to the employer for the purpose of answering that question. In other words it cannot say that the employer thinks it is fair, and therefore, it is or should be fair."

[11] On the other hand, in *SACTWU v Discreto*[5] Froneman DJP held:

> "For the employee fairness is found in the requirement of consultation prior to a final decision on retrenchment. This requirement is essentially a formal or procedural one, but, as is the case in most requirements of this nature, it has a substantive purpose. That purpose is to ensure that the ultimate decision on retrenchment is properly and genuinely justifiable by operational requirements or, put another way, by a commercial or business rationale. The function of a court in scrutinising the consultation process is not to second-guess the commercial or business efficacy of the employer's ultimate decision (an issue on which it is, generally, not qualified to pronounce upon), but to pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham (the kind of issue which courts are called upon to do in different settings, every day). The manner in which the court adjudges the latter issue is to enquire whether the legal requirements for a proper consultation process has been followed and, if so, whether the ultimate decision arrived at by the employer is operationally and commercially justifiable on rational grounds, having regard to what emerged from the consultation process. It is important to note that when determining the rationality of the employer's ultimate decision on retrenchment, it is not the court's function to decide whether it was the best

[4] [2003] 11 BLLR 1081 (LAC) para 69.

[5] *SACTWU v Discreto (a division of Trump & Springbok Holdings)* [1998] 12 BLLR 1228 (LAC) para [8].

> decision under the circumstances, but only whether it was a rational commercial or operational decision, properly taking into account what emerged during the consultation process."

[12] What can be gleaned from these authorities, it seems to me, is that the Court must not defer to the employer's decision; it must decide whether the decision to dismiss was fair under the circumstances. However, the Court need not decide whether dismissal was ultimately the only solution; it must merely decide whether the decision to dismiss was a fair one, given the circumstances that prevailed at the time and the process followed, i.e. whether the parties embarked on a meaningful joint problem-solving exercise or consensus-seeking process.

[13] Perhaps the most succinct summary is to be found in the *dictum* of Murphy AJ[6] in *SATAWU v Old Mutual:*[7]

> "The test formulated by the legislature in the 2002 amendments [to s 189 of the LRA] harkens back to the principle of proportionality or the rational basis test applied in constitutional and administrative adjudication in other jurisdictions. As such, the test involves a measure of deference to the managerial prerogative about whether the decision to retrench is a legitimate exercise of managerial authority for the purpose of attaining a commercially acceptable objective. Such deference does not amount to an abdication, and as stated in *BMD Knitting Mills (Pty) Ltd*, the court is entitled to look at the content of the reasons given to ensure that they are neither arbitrary nor capricious and are indeed aimed at a commercially acceptable objective. The second leg of the enquiry is directed at the investigation of the proportionality or rationality of the process by which the commercial objectives are to be achieved. Thus, there should be a rational connection between the employer's scheme and its commercial objective, and through the consideration of alternatives an attempt should be made to find the alternative which least harms the rights of the employees in order to be fair to them. The alternative eventually applied need not be the best means, or the least drastic alternative. Rather it should fall within the range of reasonable options available in the circumstances allowing for the employer's margin of appreciation to the employer in the exercise of its

[6] As he then was.

[7] (2005) 26 *ILJ* 293 (LC) para [85].

> managerial prerogative. The formulation of the test in this way adds nothing new. It simply synthesises what has already been said in *Discreto* and *BMD Knitting Mills*. The two decisions are not entirely at odds with one another. They are simply elucidations of the governing principle that the decision to dismiss must be operationally justifiable on rational grounds, which permits some flexibility in the standard of judicial scrutiny, depending on the context."

[14] It is against that background that the decision to dismiss the applicant must be tested.

Alternatives proposed by Myburgh

[15] Myburgh argued that Barinor should have accepted his proposal to combine the positions of CEO (occupied by Boshoff) and financial director (occupied by him). The implication was that he should have been given the opportunity to take on the position of CEO, combined with his position as FD, while Boshoff should have retired. That would have brought about a significant cost saving by removing Boshoff's salary.

[16] Barinor had two answers to this proposal. The first is that, on a practical level, it needed to retain Boshoff's expertise while negotiations for the two big property developments were ongoing. The second was a more principled one, based on the King code on corporate governance: that is that the executive positions of CEO and FD should be kept apart.

[17] On the first proposal, although the respondent's witnesses – especially Mr Gous, whose testimony was at times unnecessarily garrulous – may have gilded the lily somewhat insofar as Boshoff's ostensible extensive dealings with shareholders are concerned, it could not be gainsaid that he was playing an important role in engaging with stakeholders in finalising the two important property deals in the pipeline. It was not reasonable to change that structure at a sensitive time in the company's history when Boshoff was willing to accept another, more reasonable, proposal that would ensure his continued role in the company for another year or two.

[18] With regard to the second proposal, the current structure – of a financial manager reporting to the CEO – is not ideal. The incumbent of the financial manager position has made a number of elementary errors. But

that in itself does not make the dismissal substantively unfair merely because Barinor rejected Myburgh's proposal. Its reliance on the King III principles is persuasive. It is preferable in the interests of good corporate governance to divorce the positions of CEO and that of finance director or financial manager. In circumstances where Myburgh refused to countenance a lower salary in order to remain in such a position, it was not unreasonable to make that position redundant and to rely on a junior financial manager, coupled with a CEO who accepted a reduced salary, in order to save costs. The Court must look at the structure, not the incumbent. The fact that the present incumbent has made some errors does not make the structure unviable or unreasonable or Myburgh's dismissal unfair.

[19] Myburgh's other proposal was to create a "junior CEO" position. He could not explain with any particularity what this meant. Eventually, it transpired under cross-examination that it was essentially the same as his other proposal, i.e. that he would fulfil the roles of CEO and FD at the same salary as the existing CEO. Ultimately, it simply meant that Boshoff would retire and that he would become the CEO.

The position of CEO

[20] In the new structure that Barinor implemented, the position of FD fell away. A financial manager (instead of a financial director) now reports to the CEO. Myburgh's alternative argument was that, given the new structure, he – instead of Boshoff – should have been considered for the position of CEO.

[21] The flaw in this proposal is that the CEO position remained. Myburgh did not argue that Boshoff should have been "bumped". Boshoff accepted the alternative to his dismissal and stayed on in the CEO position. That was not unfair to Myburgh in circumstances where the CEO position was not affected by the restructuring, other than to attract a lower salary. And in any event, Myburgh had no right to the CEO position. As Prof Esterhuyse explained, when the position of CEO became vacant – e.g. when Boshoff retired – it would be advertised and a transparent process would be followed to appoint his successor.

No job grading exercise

[22] As a further ground of substantive unfairness introduced at the stage of argument, Myburgh argues his dismissal was substantively unfair "due to the fact that the reduced salary offered to him is not based on a job description or a job grading exercise".

[23] It is common cause that the parties did not engage in a job grading exercise in order to assign grades to jobs on, for example, a Peromnes scale. Myburgh provided the remuneration consultant with his job description. The consultant, Ms Saayman, benchmarked his job against that of a financial manager rather than FD/Deputy CEO. She appeared to do that because his job description was more closely matched to the position of "Financial Manager II" in the Deloitte "national remuneration guide" and the non-executive directors accepted that at a meeting on 20 August 2012.

[24] Saayman did not testify. Yet it seems to me that the offer of a reduced salary to Myburgh – similar to the offers made to the other top executives as an alternative to dismissal – was a reasonable one, even though it was not benchmarked against a Peromnes or other job grading. The question is simply whether it was reasonable for the employer to make such an offer and for the employee to refuse it, in circumstances where it would obviate his dismissal. It my view, the offer was reasonable and Myburgh's refusal was unreasonable in the circumstances. It does not make his resultant dismissal unfair.

Myburgh's refusal of alternatives proposed by Barinor

[25] Consultation in the context of s 189 is a two way street. Myburgh argues that Barinor should have accepted his proposals; but the Court must also consider whether his refusal of Barinor's alternatives to dismissal was reasonable. It is a question of fairness to both sides.

[26] At no stage during the formal s 189 process did Myburgh budge on his position that he would not accept a lower salary. His attorney did make a "without prejudice" proposal that was disclosed to the court during trial; but

that sort of behind the scenes "second stream" negotiation does not form part of the formal consultation process.

[27] If anyone had a closed mind, it was Myburgh rather than Barinor. He was fixed in his view that he remained entitled to his substantial salary. If anything, he was of the view that he should become the CEO as the anointed crown prince. He was not prepared to accept the reasonable alternatives proposed by Barinor – possibly for a few years only – in order to avoid his dismissal.

Conclusion: substantive fairness

[28] Barinor's proposal to avoid dismissal, i.e. a reduction in salary for the top four executives, appears to me to have been a reasonable one. Mr *Leslie,* for Barinor, noted that Myburgh also conceded under cross-examination that the proposal was reasonable; but a concession, like other *viva voce* evidence, must be weighed by the Court in the light of the totality of the evidence before it and the probabilities revealed thereby.[8] It is also telling that the other three executives, apart from the applicant, viewed that proposal as sufficiently reasonable to have accepted it. And in the case of the applicant and the CEO, there was an additional sweetener – he would in any event receive a substantial bonus, equivalent to 3-5 times his annual salary, once the two proposed property developments were approved and, consequently, the company's cash flow would improve.

[29] Myburgh's insistence that his proposals be accepted, on the other hand, did not go far enough to try and achieve consensus. It was primarily aimed at securing a continued lucrative position for himself at the expense of the CEO, Boshoff. It is understandable that Myburgh felt that the time had come to put Boshoff out to pasture, given that he had reached retirement age; but I find Barinor's reasons for splitting the CEO and financial positions, and to keep Boshoff on in order to finalise the all-important property deal that would address the company's cash flow woes, persuasive.

[8] *Harleck Jones Treasure Architects CC v University of Fort Hare* 2002 (5) SA 32 (E) para [88].

Procedural fairness

[30] The applicant alleges that his dismissal was procedurally unfair because Barinor "approached the consultation process with a closed mind".

[31] The underlying rationale was to save costs, and not to get rid of Myburgh. Barinor made the same proposal to him as it did to the other three top executives in order to avoid dismissals. Insofar as any criticism of a closed mind could be levelled at it, it cannot be in the sense that his dismissal was a *fait accompli*, but rather that it was not open to alternatives other than its proposal of a reduced salary.

[32] Firstly, the applicant argues that Barinor decided to benchmark his position against that of "Financial Manager II" before it initiated the s 189 process. But that was done at the behest of a committee – appointed by the Board, including Myburgh – and on the advice of the remuneration consultant on the strength of Myburgh's own job description. It was merely a tool that was used to investigate alternatives to dismissal, of which reduced salary packages to the top executives appeared to be the most reasonable option. It did not mean that Barinor closed its mind to other reasonable proposals; but those proposed by Myburgh were not, on balance, more reasonable or viable.

[33] What is not clear, is whether Barinor decided at an early stage to abolish the positions of Deputy CEO and FD. Mr Gous and Prof Esterhuyse indicated that, should Myburgh have accepted the offer of a reduced salary, he could have retained those titles. Not much turns on the titles; had Myburgh accepted the reduced salary (coupled with a substantial bonus in due course), he would have retained his position and fulfilled the same functions. And in any event, Myburgh implied in his letter of 19 April 2013 that job titles were not important to him. It is evident that his salary – and his eventual accession to the position of CEO – was more important.

Conclusion

[34] In my view, Barinor's eventual decision to dismiss was a reasonable and fair one. It considered and rejected the proposals made by the applicant for good reasons. On the other hand, the applicant refused to consider the

alternative proposed by Barinor that would have saved his job whilst ensuring a substantial continued income, especially once the property development in the pipeline had been approved. There was an alternative to his dismissal, but he rejected that alternative. Seen holistically, the dismissal was substantively and procedurally fair.

[35] With regard to costs, although there is no longer any employment relationship between the parties, I bear in mind that Mr Myburgh remains a shareholder of Barinor. Circumstances may also change with the imminent retirement of Mr Boshoff and Prof Esterhuyse as CEO and chairman respectively. The relationship between the parties – including the possibility of future re-employment – may not be entirely beyond repair. In those circumstances, taking into account the principles of law and fairness, I do not consider a costs award to be appropriate.

Order

[36] The referral is dismissed.

_____

Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Hermann Nieuwoudt of Norton Rose Fulbright.
RESPONDENTS:	Graeme Leslie Instructed by Cliffe Dekker Hofmeyr Inc.