THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Reportable

Of interest to other judges

Case no: P03/2013

In the matter between:

ALMAZEST (PTY) LTD **Applicant**

and

RALPH ALEXANDER **First Respondent**

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **Second Respondent**

BAREND J MELLET **Third Respondent**

Heard: **6 MAY 2015**

Delivered: **14 MAY 2015**

Summary: **(**Review – entitlement to severance pay – s 41 of the BCEA – Demotion and salary cut of 45 % sufficient justification for arbitrator's decision that offer of alternative employment was not reasonable – failure to suggest to new employer following s 197 transfer that it might wish to consider joining old employer not reviewable irregularity – application dismissed**)**

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LAGRANGE, J

Background

[1] This matter concerns the review of an arbitration award in which the arbitrator awarded severance pay to the third respondent who had been retrenched by the applicant shortly after the applicant had taken over the business in which the third respondent was employed as a going concern.

[2] The central issue in dispute was whether the third respondent, a store manager, was entitled to severance pay in circumstances where he had been offered employment at a salary level equivalent to 38% of his previous income and in a more junior position as assistant store manager. The arbitrator found that the third respondent had not unreasonably refused this offer of alternative employment and that the third respondent was entitled to severance pay in terms of section 41 (2) of the Basic Conditions of Employment Act, 75 of 1997 ('the BCEA') calculated on the basis of his length of service including the period of service with the previous employer prior to the transfer of the business as a going concern to the applicant in terms of section 187 of the Labour Relations Act 66 of 1995 ('the LRA').

The review application

[3] As the retrenchment took place within twelve months of the transfer of the business, the former employer was jointly and severally liable for any severance pay payable to the third respondent in terms of section 197 (7) of the LRA. However, the arbitrator did not alert either of the parties to the need to join the previous employer to the proceedings. Once he was aware that the claim involved a claim for severance pay in circumstances where the retrenchment had taken place within twelve months of the transfer of the business as a going concern under section 197, the applicant claims the arbitrator ought to have realised that the first employer necessarily should have been a party to the proceedings.

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[4] Certainly, the original employer Metcash Trading Africa (Pty) Ltd could have been cited as a co-respondent by the applicant in the proceedings but as the applicant and the Metcash are jointly and severally liable, the third respondent could elect against whom he could proceed. The applicant was at liberty to ask to join Metcash as a party to the proceedings but it was not incumbent on the third respondent to do so in order for the third respondent to pursue his claim. In this regard see the decision of Whitcher AJ in ***Strydom v T-Systems SA (Pty) Ltd*** **(2012) 33 ILJ 2978 (LC)**.

[5] In that case, it was held that the employee's failure to join the original employer as a respondent in an unfair retrenchment claim in circumstances where the retrenchment took place less than twelve months after the transfer of a business in terms of s 197 did not render the employee's claim excipiable. In other words, joinder of the original employer was not a necessity, but merely a matter of convenience. The learned judge found that it was up to the new employer, if it wished to join the original employer as a party to the proceedings.

[6] In this instance, the bulk of the severance pay entitlement, if any, due to the third respondent would have accrued from the third respondent's prior service with Metcash. Metcash would also be jointly and severally liable for any severance pay due to the third respondent by virtue of the provisions of s 197(8) of the LRA which states:

> *"For a period of 12 months after the date of the transfer, the old employer is jointly and severally liable with the new employer to any employee who becomes entitled to receive a payment contemplated in subsection (7)(a) as a result of the employee's dismissal for a reason relating to the employer's operational requirements or the employer's liquidation or sequestration, unless the old employer is able to show that it has complied with the provisions of this section."*

[7] On the basis of this section, the applicant might conceivably have sought to join Metcash in the arbitration proceedings, quite apart from any possible claim it might have had against Metcash to indemnify it for a portion of any severance pay due.

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Nothing on the record indicates that the arbitrator made the applicant aware of its right to do so. When the applicant's representative, the new owner of the business, mentioned that Metcash would be jointly and severally liable with the applicant, the arbitrator had this to say:

> *"EVIDENCE BY RESPONDENT'S REP: Firstly, my case, I would just like to mention, as I have already mentioned in the opening statement, that I am the new employer so any finding here will be jointly and severally with the other old employer.*
>
> *COMMISSIONER: Okay, let me say: I know I have raised that previously, if there was any dispute as to who was the employer, that would have been the case.*
>
> *RESPONDENT'S REP: Okay.*
>
> *COMMISSIONER: Here there is no dispute as to who is the employer. The employer is Almazest (Pty) Ltd and you are here, so there is no further confusion with regards to that part and therefore, let me clarify that as the new employer, you are liable for everything."*
>
> *RESPONDENT'S REP: Okay."*

[8] The arbitrator was clearly misleading when he told the applicant's representative that only the applicant could be held liable for the severance pay, but that does not mean that the applicant was entitled to join Metcash as a correspondent in the proceedings as a matter of necessity. The question which arises is whether the arbitrator should nonetheless have asked the applicant if it wished to join Metcash as a party to the proceedings as a matter of convenience. Joinder may be ordered on the basis of convenience and common sense[1], for example if it would be in the interests of avoiding a multiplicity of actions.

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[1] See ***Vitorakis v Wolf* 1973 (3) SA 928 (W)** at 932C-H

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[9] At the review application hearing, it was argued by the applicant that if he had joined the original employer, he could have argued for an apportionment of any severance payment found to be due by the arbitrator. The third respondent retorted that s 197(8) automatically determines that any liability for severance pay is on the basis of joint and several liability and that the arbitrator has no discretion to apportion the amount due to each. I agree that the section appears to place the new and old employers in the position of equivalent co-principal debtors, save only that the old employer might escape liability if it can prove it has complied with s 197. From the third respondent's perspective, he was entitled to choose whether to proceed against either or both employers. However, it is only the old employer that might avoid liability if severance pay is due and payable because it can prove it has complied with s 197. Accordingly, Metcash might have an interest in joining the proceedings as a party to simultaneously determine that it could *not* be held liable under s 197(8) if it believes it has complied with s 197. However, the applicant as the new employer cannot escape its liability by joining Metcash as a party after being targeted as the co-principal debtor of choice by the third respondent. It might be in the employee's interest to obtain an order against both employers, but joinder of the old employer cannot absolve the new employer of liability for payment of the severance pay if it is found to be due and payable.

[10] Another sense in which the applicant might conceivably have believed it would assist it if Metcash were joined in the matter is, if it wished to argue that Metcash has some duty to indemnify him at least partially against any successful severance pay claim arising from the provisions of s 197(7) which states:

> *"(7) The old employer must-*
>
> *(a) agree with the new employer to a valuation as at the date of transfer of-*
>
> *(i) the leave pay accrued to the transferred employees of the old employer;*
>
> *(ii) the severance pay that would have been payable to the transferred employees of the old employer in the*

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event of a dismissal by reason of the employer's operational requirements; and

(iii) any other payments that have accrued to the transferred employees but have not been paid to employees of the old employer;

(b) conclude a written agreement that specifies-

(i) which employer is liable for paying any amount referred to in paragraph (a), and in the case of the apportionment of liability between them, the terms of that apportionment; and

(ii) what provision has been made for any payment contemplated in paragraph (a) if any employee becomes entitled to receive a payment;

(c) disclose the terms of the agreement contemplated in paragraph (b) to each employee who after the transfer becomes employed by the new employer; and

(d) take any other measure that may be reasonable in the circumstances to ensure that adequate provision is made for any obligation on the new employer that may arise in terms of paragraph (a)."

[11] Even if this had been the applicant's wish, of which there was no evidence, it would be something akin to a third party joinder which is permitted in terms of Rule 13 of the High Court Rules. That procedure permits a party like the applicant to join a third party like Metcash on the basis that Metcash is liable to indemnify it against part of the severance pay claim. Thus, if there had been an agreed apportionment of liability for severance pay between the applicant and Metcash in terms of s 197(7)(b)(i) or, if the applicant wanted to argue that the Metcash was obliged to make adequate provision for its share of severance pay calculated at

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the date of the transfer under s 197(7)(d) and that it was now obliged to use that provision to meet part of the claim against the applicant, there might potentially have been another basis for joining Metcash as a matter of convenience. But that would assume the arbitrator had the power to determine the enforcement of obligations between the old and new employer. This does not seem to have been envisaged by s 41(6) read with s 41(9) of the Basic Conditions of Employment, Act 75 of 1997 ('the BCEA'), which merely provides for employees to refer disputes about their entitlement to severance pay in terms of section 41 to arbitration for determination. S 41(2) sets out the statutory entitlement to severance pay, on which an arbitrator decides, but it is the entitlement of the employee to severance pay *per se* and does not include the determination of the extent to which the old employer may be obliged to indemnify the new one in relation to such a claim or other statutory obligations to make provision for such payment. On the face of it, it does not seem an arbitrator acting under s 41 of the BCEA could entertain such related disputes.

[12] Consequently, joining Metcash in the proceedings would have no effect on determining or reducing the applicant's liability for the reasons mentioned, so there could be no advantage obtained by the applicant if Metcash were joined. The third respondent himself might have had a greater interest in joining Metcash since he could then proceed to execute against both or either of the respondents if successful proving his severance pay entitlement, without having to initiate any further proceedings against Metcash. All things considered, I do not think that there was any demonstrable prejudice the applicant suffered by not being offered the opportunity to join Metcash in the proceedings. Consequently, I do not think the award should be set aside on grounds of the arbitrator's misconduct in this regard. If it was an irregularity not to invite the applicant to consider if he wanted to join Metcash, it is unlikely the applicant could have justified such a step considering what is stated above, so that even if he had been invited to do so, it would not have affected the overall outcome of the award.[2]

[2] See ***Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others*** (2014) 35 *ILJ* 943 (LAC) at 949, para [17], viz:

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[13] The applicant does suggest that the arbitrator also neglected in a general sense to guide him in the conduct of the proceedings, but there is nothing to suggest he was not able to convey the thrust of his argument why the third respondent was not entitled to severance pay in his view in the absence of such guidance or that he was unable to present evidence relevant to his case as a result.

[14] This brings me to the consideration of the merits of the award. The essence of the attack on the arbitrator's reasoning is that the applicant contends that any reasonable arbitrator would have concluded that the third respondent's refusal to accept the position of an assistant manager was unreasonable.

[15] When the applicant took over the business and the third respondent was receiving a gross salary of R42, 649.52 which included a company medical aid contributions of R3,321.49, pension fund contribution of R 1,700.00 and a fuel and maintenance allowance of R 7,741.80 and travelling allowance of R 4,547.00 per month. This was the salary he had earned as general manager of the outlet in George, in which capacity also had regional responsibilities for Metcash. The applicant's business did not require the third respondent to perform any regional functions and the new owner intended to perform the store manager's role. Consequently, the applicant offered the third respondent a position in which he would be assistant store manager earning a gross salary of R 16, 563.86, though it must be mentioned that R 2,000-00 of this amount remained at the employer's discretion. The applicant argued that the third respondent no longer required the allowances relating to travelling because he would incur no costs in that regard. If one took into account the redundant travel related allowances, a more accurate reflection of the third respondent's real salary before the transfer would be R 30,360-00, so the real drop in his gross income to the new level would be a drop of about 45%.

[16] The applicant contends that if the arbitrator had applied his mind properly to s 41(4) of the Basic Conditions of Employment Act, 75 of 1997 ('the BCEA') in

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"The fact that an arbitrator committed a process related irregularity is not in itself a sufficient ground for interference by the reviewing court. The fact that an arbitrator commits a process related irregularity does not mean that the decision reached is necessarily one that a reasonable commissioner in the place of the arbitrator could not reach."

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conformity with the LAC decision *in* ***Astrapak Manufacturing Holdings (Pty) Ltd t/a East Rand Plastics v Chemical Energy Paper Printing Wood & Allied Workers Union*** **(2014) 35** ***ILJ*** **140**, he would not have awarded the third respondent's severance pay because that would amount to encouraging an employee from unreasonably rejecting an offer of alternative employment simply to get cash in his pocket.[3]

[17] It may well be that the applicant had good operational reasons for not wishing to continue to employ the third respondent in his previous capacity. Nonetheless, it was the owner of the applicant's choice to replace the third respondent as the manager of the outlet with himself and to demote the third respondent to an obviously more junior position. Further, even making allowance for excluding consideration of travel related allowances provided to the third respondent, the reduction in the third respondent's remuneration was dramatic apart from the fact that a portion of it was paid at the whim of the applicant. It is difficult in the circumstances to see how it can be said that no reasonable arbitrator could have viewed such a diminution of status and reduction in income as not being a reasonable offer of alternative employment in the circumstances. I do not think the arbitrator's reasoning can be faulted in this regard.

Order

[18] The review application is dismissed with costs.

R G LAGRANGE

Judge of the Labour Court

[3] *Astrapak* at para [25]

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Appearances

For the Applicant: M Euijen

Instructed by: Ayoob Kaka Attorneys

For the Third Respondent: F Le Roux

Instructed by: Bakker Attorneys

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