Blyvooruitzicht Gold Mining Company Ltd v Pretorius
[2000] JOL 6358 (LAC)

Reported in (Butterworths)	[2000] 7 BLLR 751 (LAC)
Case No:	JA67 / 99
Judgment Date(s):	30 / 03 / 2000
Hearing Date(s):	22 / 03 / 2000
Marked as:	Reportable
Country:	South Africa
Jurisdiction:	Labour Appeal Court
Division:	Johannesburg
Judge:	Conradie JA
Bench:	Conradie, Willis JJA; Zondo AJP
Parties:	Blyvooruitzicht Gold Mining Company Ltd (A); MM Pretorius (R)
Appearance:	DJ Pretorius (A); Adv S Du Toit Maritz, Roos Roux Attorneys (R)
Categories:	Appeal - Application - Civil - Procedural - Private
Function:	Confirms Legal Principle

Key Words

Labour law - Appeal - Dismissal - Operational reasons - Procedural fairness - Consultation

Mini Summary

Appeal against order that the dismissal of the respondent for operational reasons was procedurally unfair. Held, that the court a quo found the procedure to be flawed on the basis that the appellant should, in terms of the retrenchment agreement, have discussed the possibility of the respondent's retrenchment with full-time union officials rather than the monitoring committee. On appeal the Court found that the judge had misconstrued the retrenchment agreement. The appeal succeeded with costs.

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CONRADIE JA:

[1] During March 1988 the appellant dismissed the respondent for operational reasons. The Court *a quo* found that the dismissal had been substantively fair. There is no cross-appeal against this part of the judgment. The only issue before us is whether the order that the dismissal had been procedurally unfair and that the appellant should consequently pay the respondent R181 860 in compensation was correct.

[2] The respondent was one of a large number of employees who became redundant as a result of the need to restructure the appellant's mining

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operations. The need to restructure had been foreseen, so on 2 August 1997 a retrenchment agreement was concluded between the appellant and five unions representing employees of the appellant. Of the five unions two, the Administrative, Technical and Electronic Association and the Officials' Association of South Africa amalgamated to form the United Association of SA ("UASA"). The respondent, who had been a member of the Officials Association of South Africa, thus became a member of UASA.

[3] The respondent who, as head of the safety department, had been asked by the appellant's general manager to submit proposals to a workshop on the restructuring of his own department, suggested that he be retrenched as safety manager and then re-employed on the lower rung of chief safety officer. The workshop which was attended by mine and union officials did not accept this suggestion. Instead, it proposed that the functions of chief safety officer and training officer be combined. Chief safety officer was a post which, by law, had to be filled. In doing so, it accepted one of the respondent's proposals for the restructuring of the safety department.

[4] Once the decision on the restructuring of the departments had been taken the matter was considered by a so-called monitoring committee. This monitoring committee had been established in terms of the retrenchment agreement. It was to consist of one mine level representative from each of the five unions as well as two management representatives, and was to

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meet at least once a week "to discuss progress and specific cases. By "specific cases" was meant the application of selection criteria to a particular individual.

[5] The committee decided that the respondent's proposal that he be demoted from the position of safety manager and appointed to the position of chief safety officer was unacceptable. Its motivation was that bumping, which was prohibited in terms of the retrenchment agreement, would occur if the (senior) safety officer lost his job and the (junior) chief safety officer were retrenched in order to provide employment for him. The appellant decided to accept

the suggestion that Nelson, the training officer, should be entrusted with the task of chief safety officer. It thereby complied with the retrenchment agreement. There was another reason as well. It made better business sense that the safety function should be absorbed into the training function and Nelson had superior training skills to those of the respondent.

[6] The learned judge in the Court *a quo* found that the procedure had been fatally flawed. The appellant should, she said, not have discussed the respondent's case with the monitoring committee, but with full-time union officials. This was so, she held, because the retrenchment agreement provided that the retention of special skills in the interests of safety and

health had to be discussed with (and motivated to) "the full-time officials who represented the various Unions/Associations".

[7] In the context of the retrenchment agreement, the provision clearly means that if the appellant, for safety and health reasons, wished to retain the services of a candidate for retrenchment with special skills it would have to motivate its desire to do so to "the full-time officials". There had, however, been no attempt by the appellant to retain the respondent's skills. In fact, it considered Nelson's skills for the combined task of training and safety to be superior to those of the respondent. It cannot be said that the retention of Nelson should have been discussed with full time officials because he was not, in terms of the restructuring plan, a candidate for retrenchment. There was no contest between Nelson and the respondent, with the one possessing superior skills winning out against the other. All that was, in consultation with the monitoring committee, decided, was not to appoint the respondent to Nelson's (expanded) job since that would *have* meant bumping him in contravention of the retrenchment agreement.

[8] The learned judge fell into the error which she did because she construed the decision to vest the combined training security function in Nelson as the creation of a new position. Hence there was an abolition of the two positions of safety manager and training officer and a contest between Nelson and the respondent for the newly created position. I do not

consider that the evidence supports the conclusion that a new position had been created. It demonstrates no more than that Nelson was given additional duties and, because chief safety officers at the mine were traditionally appointed at grade 18, he advanced two pay grades from his then position on grade 16.

[9] It was argued before us and before the Court *a quo* that the monitoring committee was not constituted as envisaged in the retrenchment agreement and that UASA had not been authorised to represent the respondent in retrenchment negotiations with the appellant.

[10] Mr Boshoff, the appellant's human resources manager, testified that the composition of the monitoring committee laid down in the retrenchment agreement was, with the agreement of an informal workplace forum, varied by providing that consultation would take place between management and unions representing those employees identified for possible retrenchment. The way this worked out in practice was that each of four unions including the two which had amalgamated to form UASA which were signatories to the retrenchment agreement had one representative on the monitoring committee. The representative of the only other union, the Mine Workers' Union, was not present at the committee's deliberations. Also, there was one management

representative instead of two. It was considered that it would be fruitless to discuss the fate of a particular individual with representatives of unions other than his own. They would not be authorised to make representations on his behalf and would in any event have no interest in doing so. In rejecting Boshoff's evidence the Court *a quo* in effect found that the new procedure was introduced against the wishes and without the co-operation of the unions. There is no evidence to suggest anything of the kind. The court rejected Boshoff's evidence because, as a single witness, it was said that his evidence had to be treated with caution. This is a perversion of the true rule. In criminal cases the evidence of a single witness is only treated with caution if it is contested by an accused. Evidence which is uncontradicted may only be rejected if it is inherently improbable. It seems to me highly probable that Boshoff's evidence is correct. It sounds such a sensible thing to have done that it can occasion no surprise that it was indeed done. It was a more efficient process and gave potential retrenchees greater rights than they had enjoyed under the original retrenchment agreement. In my view the Court *a quo* had no occasion for rejecting Boshoff's evidence in this regard.

[11] Although it was contended that UASA had no authority to represent the respondent who was allegedly not a member of that union, the Court *a quo* did not go so far as to hold that the respondent had not been represented by UASA. In this it was correct. There was no challenge to the evidence of

Mr Steyn, the appellant's general manager, or Boshoff, that the union representing the respondent was UASA. There was also some suggestion that the respondent was dissatisfied with the quality of the representation which

he was given, but that is not a complaint which can be laid at the appellant's door.

[12] There is no merit in the point that the union representative who conducted the discussion on behalf of UASA had not been mandated by the respondent. When a trade union conducts negotiations of this kind, it represents the interests of employees. It acts as their spokesperson. It does not act as the agent of any one of them (*Amalgamated Engineering Union v Minister of Labour* 1949 (4) SA 908 (AD) at 913). A union's obligations in situations of collective bargaining derive from principles of representative governance rather than principles of agency (cf Sarah Christie *Majoritarianism, Collective Bargaining and Discrimination* (1994) 15 ILJ 708).

[13] The parties' representatives were *ad idem* that costs of the appeal should follow the result. This would include the costs of the application for leave to appeal on which no costs order was made in the Court *a quo*. The learned acting judge made no order on the costs of the proceedings in the

lower court. We were not asked by Mr Pretorius for the appellant to interfere with this and I do not consider that we should do so.

1. The appeal succeeds with costs which are to include the costs of the application for leave to appeal.

2. The order of the Court *a quo* is set aside and replaced by an order reading: "The application is dismissed".

(Zondo AJP and Willis JA concurred in the judgment of Conradie JA.)