REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Case no: CA15/2011

In the matter between:

4SEAS WORLDWIDE (PTY) LTD	**Appellant**
and	
THE COMMISSION FOR CONCILIATION	
MEDIATION AND ARBITRATION	**First Respondent**
S BHANA N.O.	**Second Respondent**
LIESL VAN DER BERG	**Third Respondent**

Heard: **14 March 2013**

Delivered: **13 November 2013**

Summary: Dismissal for operational requirements- principle reinstated- employer having the *onus* to prove the dismissal of employee was fair and that it followed a fair process. Employer relying on an alleged agreement with employee to justify retrenchment - evidence showing that no such agreement was reached- no proper and legally acceptable rationale for the decision to dismiss employee- employer failing to discharge the onus.

Procedural fairness- employer using consultation to facilitate the dismissal- employee refusing to participate in the consultation process as termination of employment was a *fait accompli* and the process a sham- appeal dismissed with costs

Coram: Waglay JP, Tlaletsi ADJP and Coppin AJA

JUDGMENT

COPPIN AJA

[1] This is an appeal against the order of Steenkamp J, in the Labour Court, dismissing, with costs, an application brought by the appellant in that court to review and set aside an arbitration award made by the second respondent, acting under the auspices of the first respondent, in favour of the third respondent ("*Van der Berg*"). The second respondent found that the dismissal of Van der Berg by the appellant was procedurally and substantially unfair and ordered the appellant to pay Van der Berg compensation equivalent to five months' remuneration plus one month's notice pay and her legal costs on scale A of the magistrate's court tariffs.

[2] An application for condonation for the late filing of the appellant's heads of argument was granted. At the outset of the hearing of the appeal, this Court also raised two further issues with the appellant's counsel, namely, regarding the pagination of the record and the commissioning of the founding affidavit in the review application which was brought in the court *a quo* and which is the subject of this appeal. In my view, these concerns were satisfactorily addressed in a note submitted by the appellant's attorney and nothing further needs to be said about them.

[3] It is common cause that at the arbitration hearing, the only witness that gave evidence on behalf of the appellant was a consultant the appellant had engaged, namely, Mr Steven Beukes ("*Beukes*"). Van der Berg gave evidence in response. Her evidence about her interactions with the appellant's representatives, other than Beukes, was not refuted. The common cause facts, or those that were not seriously disputed are, briefly, the following. Van der Berg was appointed as the general manager of the appellant's Cape Town business from 1 August 2008. She was reporting to one Mr Mark Llewellyn ("*Llewellyn*"), a director of the appellant, based in London. The

appellant also had a second director, one Mr Leon Bubenicek ("*Bubenicek*"), who was based in Australia.

[4] Van der Berg had been receiving positive feedback on her performance from Llewellyn by way of weekly teleconferences. However, from about March 2009 to 1 April 2009, Bubenicek alleged poor performance on her part. Since Van der Berg had been aware that two of her predecessors in the position had been dismissed, allegedly for poor performance, she made an effort to satisfy the requirements of the appellant. According to Van der Berg, Bubenicek could not substantiate his allegations that her performance was poor. On 25 and 26 March 2009, Bubenicek tried to change the targets that Van der Berg had all along been required by the appellant to meet. On 1 April 2009, Bubenicek asked her to complete a performance review form. She was not required to complete such a form previously. Bubenicek gave her a week to prove and set high performance levels. According to Van der Berg, she tried her best to corporate with Bubenicek, but she was aware that her predecessors had been dismissed after a similar process had been followed.

[5] All along Van der Berg had been reporting to Llewellyn, with Bubenicek's intervention, her reporting line became uncertain. As a result, on 2 April 2009, she wrote to Llewellyn and Bubenicek to clarify this. On 3 April 2009, in response to her letter, Bubenicek sent Van der Berg a counselling form to sign as a matter of urgency. Bubenicek made allegations, *inter alia,* of a deteriorated working relationship, fraud amongst the staff under Van der Berg as well as bad time-keeping and management. Van der Berg replied that she required legal representation in the circumstances.

[6] In the interim, and on or about 6 or 7 April 2009, Bubenicek approached a labour consultant, Beukes, for advice regarding Van der Berg's alleged poor performance. According to Beukes, Bubenicek told him that they had a number of concerns regarding Van der Berg's poor performance and they (referring to Bubenicek and Llewellyn) had come to Cape Town in February of that year to meet with her to discuss these issues. They told Beukes that Van der Berg was unresponsive and not meeting the request to change things. They further informed him that Van der Berg was the third general manager

that they had appointed, but that her performance has not improved; that they were spending a lot of time and effort and could manage without such a person by managing the inbound and outbound managers directly and Beukes was requested to advise them on the process that was required. According to Beukes, communication between him and them (i.e. Llewellyn and Bubenicek) was by e-mail. Beukes testified that he advised them to go through an operational requirement process which would include consultation with Van der Berg.

[7] Van der Berg, on her part, had also enlisted the assistance of a labour consultant, Ms Cynthia Hayward ("*Hayward*"). On 7 April 2009, Van der Berg responded to the counselling form that had been sent to her by Bubenicek. According to Van der Berg, she responded fully and showed that the allegations made by Bubenicek lacked substance. Van der Berg testified that on that same day there was a telephone conference which she, Hayward and Bubenicek participated in and in which all performance issues were resolved. According to her, the conference concluded on a positive note and she was of the view that they were going to move forward on a more positive note and that Bubenicek had accepted her responses. Bubenicek never mentioned to her that her position would be made redundant, or that she would be asked to leave.

[8] It was common cause that at the time Van der Berg was not aware of the discussions between the appellant (i.e. its directors Llewellyn and Bubenicek) and Beukes, nor was Beukes aware of the conversation of 7 April 2009 between Van der Berg, Hayward and Bubenicek.

[9] On 8 April 2009, Llewellyn telephoned Van der Berg and told her that Bubenicek was purchasing the business and did not want to continue employing her. He proposed to her that she be bought out. He suggested that she get legal representation in order to discuss what offer she would accept. According to Van der Berg, she told Llewellyn that this was not her wish and that she was and always would be totally committed to the business.

[10] It was Beukes' evidence that Llewellyn had informed him that he (Llewellyn) had reached an agreement with Van der Berg that she would leave the appellant and negotiate the terms of a settlement. According to Beukes, Llewellyn sent him a copy of an e-mail which Llewellyn had written and in which he purported to describe the conversation that he had had with Van der Berg on the issue and requesting Van der Berg to discuss the terms of the settlement. Consequently, according to Beukes, he arranged a meeting with Van der Berg and met with her and Hayward on 15 April 2009. As far as Beukes was concerned, and as advised by Llewellyn, this was just to negotiate a settlement. Beukes had with him a letter that he had prepared based on the assumption that there was an agreement on the termination of the employment relationship between the appellant and Van der Berg. Beukes had been advised by his clients, and in particular Llewellyn, that since there was an agreement to terminate her employment, it was not appropriate for Van der Berg to be in the office of the business and that she should be asked to leave. Beukes informed Van der Berg and Hayward accordingly. This was objected to. Beukes was informed by Van der Berg and Hayward that there was never any agreement that Van der Berg would leave the business and that her employment would terminate. Beukes testified that he was taken by surprise by this. He was informed by Van der Berg and Hayward that Van der Berg had participated in a performance process which culminated in a telephone conference of 7 April 2009 between Van der Berg, Hayward and Bubenicek and that it appeared that the relationship was ongoing. They also told Beukes that Van der Berg never agreed to a termination of her employment. Van der Berg was equally surprised by what Beukes had to say in that regard.

[11] According to Beukes, he telephoned his clients and told them that there was no agreement on termination, but they maintained that there was an agreement, and expressed to him that '*we must stick to this course'*. According to Beukes, he advised Llewellyn and Bubenicek that if they (i.e. his clients) wanted to terminate Van der Bergh's employment they must have a '*fair reason*' and follow a fair process. According to him, he mentioned to them that on what they had told him, the position of general manager was

redundant and if that was their view, they must put it to Van der Berg and give her an opportunity to respond. On that basis, according to Beukes, he was given instructions to prepare a communiqué setting out the facts, as the appellant understood them, and invite Van der Berg to engage in a consultation on the matter. Beukes testified that he prepared a letter to that end, the contents of which were confirmed by Llewellyn and Bubenick. He arranged to meet Van der Berg and Hayward on 15 April 2009. This second letter, which was dated 15 April 2009, was handed to Van der Berg at the meeting.

[12] Van der Berg also testified the impressions and views that she had at the first meeting with Beukes; her receipt of his first letter and in particular how it affected her relationship with Llewellyn and Bubenicek. She testified that it completely ended their relationship. She knew that she could not trust them anymore and that it was quite clear to her that '*something had been going on'*. The content of the first letter was in conflict with what she was told by them and, according to her, she knew at that point that that would be the end of their working relationship.

[13] After the meeting at which Van der Berg was given the letter dated 15 April 2009 (i.e. the second letter) the appellant, through the agency of Beukes, purported to follow a retrenchment procedure. In a letter dated 16 April 2009 Llewellyn intimated that the reasons stated in the letter of 15 April 2009 were reasons relating to the appellant's operational requirements. It was common cause that Hayward on behalf of Van der Berg, wrote to Llewellyn on 17 April 2009 stating that the appellant's actions were unlawful, but since it was obvious that the appellant intended to terminate Van der Berg's employment, he should make her a reasonable offer.

[14] On 20 April, Van der Berg received a letter, purportedly written by Llewellyn. This letter was also e-mailed by Beukes to Hayward on 22 April 2009. In it Llewellyn sought to justify the termination of Van der Berg's employment on the basis of an alleged telephonic agreement that he (i.e. Llewellyn) had with Van der Berg on 7 April 2009 to that effect and confirming the invitation to consult. Van der Berg received another letter, purportedly from Llewellyn, on

24 April 2009 stating that consultations should conclude by the end of April 2009. However, subsequently, on 25 April 2009 Van der Berg received an electronic message from Llewellyn stating, *inter alia,* that he had been travelling back from Hawaii for 26 hours and would call Van der Berg the next week to agree on something. Because of this it did not appear to Van der Berg that Llewellyn had written the letter dated 24 April 2009.

[15] However, in the next development, Van der Berg received a letter of termination from the appellant dated 5 May 2009. The letter was purportedly written by Llewellyn. In the letter, Van der Berg was advised that she would receive notice and leave pay, but no severance pay as she had worked less than a year for the appellant. After receiving the letter, Van der Berg received a telephone call from Llewellyn and he feigned ignorance about the letter of 5 May. He expressed surprise that she was no longer employed by the appellant and denied writing any of the letters that she had received from him.

[16] According to Van der Berg, which evidence was also not disputed, she returned the appellant's property to it, but was not allowed to collect her personal items from the appellant. She only received payment up to 5 May 2009, but was not paid any notice pay. At the time her monthly salary was R44 197,00. Van der Berg also testified that she was aggrieved by this treatment and that her dismissal by the appellant had a serious negative effect on her. She not only faced serious financial issues, but also could not find other employment. Consequent upon her dismissal, she referred an unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration ("*CCMA*"). The matter was eventually set down for arbitration before the second respondent.

[17] In the arbitration award, which is dated 1 October 2009, the second respondent, having analysed the evidence and arguments presented, concluded, *inter alia*, that the evidence shows that the appellant had taken a decision on the redundancy of Van der Berg's position before commencing the consultation process with her; that this was contrary to section 189(1) of the Labour Relations Act 66 of 1995 ("*the Act*") which requires that consultation commences when '*the employer contemplates and not when the*

decision is a fait accompli'. The second respondent referred for this finding, in particular, to an e-mail from Llewellyn to Van der Berg, dated 8 April 2009 wherein, Llewellyn recorded that he had told her that she would be the last general manager; that the job was to be made redundant and inviting her to negotiate an 'agreed redundancy'.

[18] The second respondent also found that it was '*equally obvious*' that the reason for the decision to terminate Van der Berg's employment related to her alleged poor performance and not to '*any economic rationale*'; that the appellant's decision to dismiss Van der Berg was a way to avoid the responsibility of managing her and that that was not a fair, nor genuine, reason to terminate her services in terms of section 189 of the Act. The second respondent further concluded that the consultation process was '*no more than a sham*' and that Van der Berg was justified in refusing to participate in it. He ruled that her dismissal was substantively and procedurally unfair and ordered the payment of the compensation referred to in the first paragraph of this judgment, since Van der Berg did not want to be reinstated.

[19] The appellant brought an application in the court *a quo* to review the award of the second respondent. It cited several grounds, apparently relying on the decision in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[1]. The main ground being that the decision of the second respondent was one which a reasonable decision-maker would not have reached. Having considered the facts, the court *a quo* concluded that the second respondent properly considered the evidence and made an award that a reasonable decision-maker could have made on the facts. The court *a quo* confirmed the findings that there was no *bona fide* commercial rationale for the dismissal and that Van der Berg had been presented with a *fait accompli* that her position would be made redundant; and that the appellant's conversion of her failed performance management process into a retrenchment process was a sham.

[1] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) para [110].

[20] The appellant submits that the court *a quo* erred in that it endorsed '*erroneous and effective*' material findings of the second respondent and more in particular, the findings that the decision to terminate Van der Berg's employment for operational reasons was a "*sham*" and "*fait accompli*"; the finding that the real reason for Van der Berg's dismissal was her performance; that the decision to dismiss Van der Berg was substantively and procedurally unfair (since there was allegedly only a finding with regard to substantive fairness); and the second respondent's failure to have regard to the fact that Van der Berg refused to participate in any consultation process. It was further submitted that the second respondent could not find that the general manager position was not redundant because no proof to the contrary had been produced.

[21] It was submitted on behalf of Van der Berg, in essence, that the second respondent's findings and decision were rational and reasonable and that the court *a quo* did not err in confirming them and further, that it could not be said that the second respondent's findings and decision were such that a reasonable decision-maker could not have arrived at on the facts.

[22] I am of the view that there is no merit in any of the grounds raised by the appellant. I shall traverse them shortly. As a general point, a fundamental weakness of the appellant's position resides in the fact that neither Llewellyn, nor Bubenicek, came to give evidence, or refute Van der Berg's evidence pertaining to their conduct and motives. Beukes was merely a consultant for the appellant and he could not refute Van der Berg's evidence of the direct and personal interactions which she had with Llewellyn and Bubenicek. Beukes was employed for his own account, did not have first hand knowledge of crucial facts, could not make any decisions without either Llewellyn, or Bubenicek, and followed their instructions. Van der Berg's version, including her view on the conduct and motives of Llewellyn and Bubenicek was not contested.

[23] It was incumbent on the appellant to prove that the dismissal of Van der Berg was fair and that it followed a fair process before terminating her employment. This included proving that the redundancy of her position and the termination

of her employment was not a *fait accompli*, before trying to engage Van der Berg in a consultation and, further, that the alleged process followed was not a sham. In my view, the appellant failed to discharge the *onus*.

[24] It was held in *SACTWU and others v Discreto (a Division of Trump and Springbok Holdings,*[2] that it was not the function of the court in scrutinising the decision to retrench workers to determine whether that decision was wise, but only whether it was a rational commercial or operational decision taking into account what emerged from the consultation process that preceded the retrenchment. The requirement of consultation is a formal and procedural requirement, but it has a substantive purpose. That purpose is to ensure that the ultimate decision arrived at (i.e. to retrench) was genuine and proper due to operational requirements, i.e. justified by a commercial or business rationale. With regard to the consultation process, it was held there that consultation must precede a final decision on retrenchment since it is impossible to determine beforehand what might emerge from the consultation and to what extent that might influence a final decision. Allowing for representations after the decision has been made, cannot inform the decision already taken and will be met by a justification of the decision which had been taken before the consultation.

[25] In this matter, no one of the appellant, who had direct and personal knowledge of its commercial or financial dealings, testified. Beukes was clearly not such a person. Consequently, the appellant could not even establish a proper and legally acceptable rationale for the decision to dismiss Van der Berg. In any event, and more basic than that, and without even taking into account the contested email, the admissibility of which was objected to, the evidence clearly established that a decision had been taken even before Beukes advised that a consultation process be followed, to terminate Van der Berg's employment.

[26] There is no reason not to accept Van der Berg's evidence of what Llewellyn told her, namely, *inter alia*, that Bubenicek wanted to get rid of her. Llewellyn

[2] *SACTWU and others v Discreto (a Division of Trump and Springbok Holdings)* [1998] 12 BLLR 1228 (LAC) paras [8] and [9].

did not mention to Van der Berg that he had problems with her performance. Bubenicek, on the other hand, seemingly tried to raise performance issues, no doubt as a reason to get rid of Van der Berg. When the performance- issue – approach did not help, Llewellyn tried to rely on an alleged agreement of Van der Berg to resign. It is only when Beukes realised that there was no such agreement that he advised a retrenchment process. By then Van der Berg's fate had been sealed. The appellant simply sought a method of facilitating this. The proposed consultation process was clearly not genuine and *bona fide*, and Van der Berg was justified in not participating in it. She cannot be faulted for not wanting to participate in a sham.

[27] It is clear from the correspondence, and the various interactions Van der Berg had with Llewellyn and Bubenicek, that they were not *bona fide.* Both, Llewellyn and Bubenicek, were playing a game of pretence with Van der Berg. Llewellyn pretended not to have had any part in the decision to terminate her employment and pointed to Bubenicek, but then he, opportunistically, alleged that Van der Berg had agreed to resign. Letters were written in Llewellyn's name, but he, in effect, denied having written them. The fact that Van der Berg could not dispute that the appellant had not employed a General Manager does not assist the appellant. There was no proper, admissible proof that such an appointment had not been made and even if one accepts that the appointment was not made that does not amount to proof that the post was redundant. Lastly, even though the email of 8 April 2009 was objected to, the second respondent did not uphold the objection. In any event, the email was not relied upon to prove that Llewellyn had told Van der Berg that she would be the last general manager and that the job would be made redundant, but that the email including statements in those terms, or to that effect, was sent to Beukes. It is also clear from the evidence that Beukes relied, *inter alia*, on the contents of that email to conclude that Van der Berg's position had become redundant – and it must have been part of the basis of Beukes' advice to Llewellyn and Bubenicek. In my view, the second respondent's assessment of the evidence and his conclusions were correct and clearly findings that a reasonable decision-maker could have made. The court *a quo* cannot be faulted in finding accordingly.

[26] There is no reason in fairness and in law why the costs should not follow the result. The appeal is dismissed with costs.

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P Coppin

Acting Judge of the Labour

Appeal Court

I agree:

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B Waglay

Judge President of the

Labour Appeal Court

I agree:

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L P Tlaletsi

Acting Deputy Judge President

of The Labour Appeal Court

APPEARANCES:

FOR THE APPELLANT:	Mr Aggenbach
	Instructed by Werksmans Inc Attorneys
FOR THE THIRD RESPONDENT	Mr Kantor
	Instructed by Schneider Attorneys