THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JA 100/23

In the matter between:

FISCHER TUBE TECHNIK SA **Appellant**

and

EDMORE BAYENE **First Respondent**

BEN BOKABA **Second Respondent**

Heard: **14 May 2024**
Delivered: **21 May 2024**
Coram: Savage ADJP, Musi *et* Van Niekerk JJA

JUDGMENT

VAN NIEKERK, JA

Introduction

[1] This is an appeal against a judgment delivered by the Labour Court on 3 February 2023, in which the Labour Court found that the dismissal of the respondents (the employees) was substantively unfair. The appellant had dismissed the employees after a consultation process conducted in terms of s 189 of the Labour Relations Act[1] (LRA), in circumstances where the employees' posts had become redundant. The employees had been offered appointments in posts at a lower level in terms of the application of the principle of vertical bumping. The

[1] Act 66 of 1995, as amended.

employees refused to accept the lower posts because they were not willing to accept a reduction in salary commensurate with the conditions of employment that attached to the lower level posts, and were then retrenched. After a failed conciliation, a dispute about the fairness of the retrenchment was referred to the Labour Court for adjudication.

Factual background

[2] The material facts are not in dispute. The appellant is engaged in the motor industry and manufactures steel tubing, including exhaust pipes. The employees were engaged by the appellant in October 2011 and December 2010, as a calibrator and cutter respectively. I shall refer to the department in which they worked as the cutting and calibration department. In 2013, the appellant secured business that required work for what is referred to as 'Mig welding'. Positions became available in the welding department for the performance of that work. After they applied for appointment to the posts, the employees were appointed as welders in May 2013. Later that same year, each received an increase in salary. The employees continued working in the welding department for some three years and nine months. In 2016, the client who had provided the work in which the employees were engaged closed its operation in South Africa with the result that the specialised welding undertaken by the employees was no longer required.

[3] On 30 September 2016, the appellant issued notices in terms of s 189 (3) of the LRA to each of the employees, advising them that they had been potentially affected by the proposed retrenchment, given that the work undertaken by them would no longer be performed. During the consultation process that followed, the employees were represented by the National Union of Metalworkers of South Africa (NUMSA).

[4] On 28 October 2016, the appellant wrote to NUMSA and recorded the following:

> 'During both consultation sessions, the union alluded to the fact that they would propose LIFO and bumping as selection criteria as there are no other

employees who have been employed for a shorter period than the current affected employees in other departments.

We would like to place on record that the company maintains its position that this is a department specific exercise and that the need to consult arose as a result of the department ceasing to exist, thus only affecting the two persons currently engaged in that department. However, the company is willing to consider a proposal of LIFO and bumping in the departments of cutting and/or calibration.

We further feel the need to record the fact that your veiled threat of 'using your power' to force the company into accepting your demands by stopping production, was uncalled for and out of place, seeing as we have not made any final decisions and have been consulting in good faith to reach the best solution.'

[5] On 23 November 2016, the union wrote to the appellant with the following proposal:

'As the union representing the employees to be affected by the s nine [sic], we would like to propose the following regarding the employees who are to be moved from their current position to the lower positions:

- they are moved to the new positions with their current salaries as the positions that they will be moved to will have a huge decrease in their salaries or alternatively that remain to [sic] the same salary grade and do not receive their increment for 2016 when gazetted by the Minister.'

[6] On 7 December 2016, the appellant again wrote to the union recording the following:

'We would like to place on record that the company has been more than reasonable and has accepted your proposal on the selection criteria, instead of dealing with the same as the redundancy and department specific matter as it intended. Your suggestion of LIFO and bumping was thus agreed to and to [sic] positions were identified, to which the parties once again agreed. The very nature of bumping is that a person steps into the shoes of the person he is bumping, meaning that he takes the position as it is, with the benefits, duties etc. connected to that position. It is thus not unreasonable or in bad

faith for the company to not accept your proposal and your suggestion of same, as well as alleged unfairness is seen as uncalled for and vehemently denied. …

We thus confirm that the proposal is that the affected employees be offered the positions as per the agreement of the last meeting, with the benefits, rights, duties etc. connected to the position as it stands currently. This is a reasonable alternative to retrenchment, which was suggested by you as the trade union and which was agreed upon. We herewith give your members until 9 December 2016 to reach a decision in this regard after which the alternative shall be withdrawn and we will proceed with the matter, with your member subsequently forfeiting their severance package.'

[7] Mr Sesing, the appellant's human resources manager, testified that it was not feasible for the employees to retain their existing, higher salaries while performing work at the lower level in the cutting and calibration department. The employees would in those circumstances be earning a higher salary than other employees in the department engaged at the same level, and in any event, the appellant could not afford what Mr Sesing referred to as the 'huge discrepancy' in salary.

[8] The deadline of 9 December 2016 was extended to 23 January 2017 and in the absence of any response from the union, the appellant sent each of the employees a notice of termination of employment, in terms of which their employment would terminate with effect from 28 February 2017.

The Labour Court

[9] The Labour Court dismissed the employees' claim that the appellant had failed to establish a commercial rationale for the abolition of their posts. In relation to bumping, the Court held that in general terms, an employer is obliged to attempt to find alternative positions for employees whose positions have become redundant. The Court found that the consultation process had been genuine and *bona fide* and that, in terms of the agreed selection criteria, the alternative positions were offered and accepted, but for the condition that attached to the proposed retention of existing salary levels to be presented afterwards. The Court made reference to the concepts

of vertical and horizontal bumping, describing the first as a transfer to "*a position of similar status, conditions of employment and remuneration*", whereas vertical bumping contemplated a transfer to a position "*with less favourable status, conditions of employment remuneration*". The Court made reference to the synopsis of principles established by this Court in *Porter Motor Group v Karachi*[2] (*Karachi*) and made the following observation:

> '[22] The principle laid out in [the] *Karachi* case is simply that the employees may refuse the vertical bumping and if this is imposed on them then the dismissal becomes unfair. If this principle is anything to go by then the dismissal of the applicants is unfair. It is common cause that the criteria for retrenchment being agreed upon as LIFO and bumping. This agreement however was not permanently fixed as it required the parties to further discuss and agree on which bumping to adopt. There is further no question that two employees were identified which employees would have been bumped with the applicants alternatively sacrificed. The issue however became the union demanding that horizontal bumping be applied whilst the respondent opted and was steadfast on vertical bumping.
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> [23] I must indicate that during the hearing there was simply no persuasive evidence led by the respondent as to why horizontal bumping was not a viable option save to merely argue that it was not viable. Ultimately then I am inclined to find that the dismissal of the applicants was procedurally fair but substantive the unfair…'

[10] The Court went on to award the employees compensation in an amount equivalent to ten months' salary each.

Grounds for appeal

[11] The grounds for appeal are narrow. The first substantive ground is that the Labour Court erred in finding that the appellant ought to have applied the principle of horizontal bumping. The second ground of appeal relates to the award of compensation made by the Labour Court, which the appellant contends is excessive.

[2] (2002) 23 *ILJ* 348 (LAC).

[12] The appeal was not opposed, nor were any heads of argument filed in opposition to the appeal. At the hearing, the respondents appeared and submitted that the judgment of the Labour Court ought to be upheld.

Analysis

[13] The concept of bumping, or what has been more elegantly termed 'transferred redundancy', contemplates the dismissal of an employee not initially selected for retrenchment to make way for another employee, usually an employee with longer service, whose position has become redundant.[3] The question of bumping ordinarily arises when LIFO is applied as a selection criterion. As Prof Rochelle le Roux points out,[4] the unit or pool within which LIFO is applied (for example, geographically, across the business, by department, or by job category) can lead to vastly different results and will often dictate which employees are selected for retrenchment and which are not. Bumping assumes two forms – horizontal bumping and vertical bumping. Horizontal bumping occurs when an employee in a redundant post displaces an employee with shorter service at the same or a similar level. Vertical bumping occurs when an employee in a redundant post replaces an employee with shorter service engaged in a lower position in the occupational hierarchy.[5] As this Court observed in *Karachi*, horizontal bumping assumes similar status, conditions of service and pay, while vertical bumping assumes a diminution in status, conditions and service and pay.[6]

[14] In South African law, bumping forms an integral part of the application of LIFO.[7] While there is no absolute obligation on an employer applying LIFO to bump, it is a matter that ought properly to be canvassed during the consultation process when LIFO is agreed. Indeed, it is not open to an employer to contend that employees cannot raise the issue of bumping only because they failed to do so

[3] As this Court stated in *Mtshali v Bell Equipment* (DA16/12) [2014] ZALAC 37 (22 July 2014) (*Mtshali*) at para 22, bumping entails "*longer serving employees being moved to take up positions of employees with less service and who were not necessarily targeted for retrenchment*".
[4] R le Roux, '*Retrenchment Law in South Africa'* (LexisNexis) at p 130.
[5] Le Roux at p 132.
[6] *Karachi* at para 16.
[7] Le Roux at p 131, citing *Mtshali*.

during the consultation process. In *General Food Industries Ltd t/a Blue Ribbon Bakeries v Food & Allied Workers Union & others*[8], this Court said the following:

> 'Counsel's submission is that, if a union has failed to raise bumping or indeed any alternative measure to retrenchment during consultation, it is precluded from raising it to challenge the fairness of the dismissal at trial… In my judgment, the only conceivable legal basis for such a submission would be an agreement or a waiver. If it were to be found that a union had agreed not to rely on a particular basis, eg bumping, to challenge the fairness of a dismissal or that it had waived its right to rely on a particular basis to challenge the fairness of a dismissal, it certainly would be precluded from raising such a basis at trial. I cannot see any other legal basis in the absence of a statutory provision.'
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> As Prof Le Roux observes, the ultimate responsibility for fairness remains with the employer.[9]

[15] In the present instance, the appellant initially intended to retrench both employees because their posts had become redundant. After NUMSA's proposal that vertical bumping be applied rather than the department-specific approach that the appellant had intended, the appellant agreed to apply that principle to the benefit of the employees and after investigation in the cutting and calibration department, employed agreed criteria to identify two employees to be bumped. Their positions were offered to the employees at the rates for the job. The employees refused to accept the positions, demanding to remain on their existing salaries, conceding only that they would forgo a wage increase in the following year.

[16] In reaching the conclusion that the employees' dismissal was unfair only because the appellant had failed to lead persuasive evidence as to why horizontal bumping was not a viable option, the Labour Court's judgment overlooks a number of issues, both principled and factual. First, the Court's observation that the principles established in *Karachi* provide that "*the employees may refuse the vertical bumping and if this is imposed on them then the dismissal becomes unfair*" is a misreading of that judgment. There is no such principle established by the judgment,

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[8] (2004) 25 *ILJ* 1655 (LAC) (*Blue Ribbon*) at para 29.
[9] Le Roux at p 132.

and it is difficult to appreciate what is meant by having vertical bumping 'imposed' on an employee. While an employee no doubt remains perfectly entitled to refuse any offer of vertical bumping (not least on account of the inevitably lower salary that would attach to the lower position) it does not necessarily follow that any dismissal consequent on that refusal is, without more, unfair. Secondly, The Labour Court appears to have equated the terms horizontal and vertical bumping with retention and a diminution respectively of terms and conditions of employment. When the Court stated that "*[T]he issue however became the union demanding that horizontal bumping be applied whilst the Respondent opted and was steadfast on vertical bumping*", the Court equated NUMSA's position (that any bumping was to be effected without prejudice to the employees' existing terms and conditions of employment) with horizontal bumping. Although, as this Court observed in *Karachi*, vertical bumping is inevitably accompanied by a diminution in salary, bumping is a concept related to the employer's organisational structure, and not the effect that placement in an alternative position may have on the salary of any employee who benefits from the application of bumping. To be clear, horizontal bumping is the placement of an employee within the organisational structure at the same or a similar level; vertical bumping is placement (usually) at a lower level. What terms and conditions attach to any form of bumping that is implemented is a separate matter, best dealt with in the consultation process.

[17] What the applicable authorities[10] require is that an employer applying LIFO must raise and discuss the question of bumping with consulting parties during the consultation process. In the absence of any agreement on the issue, the employer must be in a position to justify its decision not to bump, or to bump either horizontally or vertically, within the selection pool that it has defined. Ultimately, any requirement to bump is a matter of fairness, both to the employer (who faces the disruptive consequences of bumping), the employee selected for retrenchment (whose job security is at risk in the absence of bumping) and the displaced employee (whose job security is equally prejudiced on account of the application of bumping). In the present instance, the Labour Court appears to have considered that the appellant's

[10] *Mtshali supra*; *Blue Ribbon supra*; *National Construction Building and Allied Workers Union & others v Natural Stone Processors (Pty) Ltd* [2000] ZALC 2; (2000) 21 *ILJ* 1405 (LC); *Amalgamated Workers Union of SA v Fedics Food Services* (1999) 20 *ILJ* 602 (LC).

failure to apply the principle of horizontal bumping rendered the dismissals unfair *per se*. To that extent, the Labour Court erred in drawing the conclusion it did.

[18] In any event, on the facts, the Labour Court erred by finding that NUMSA had demanded that horizontal bumping be applied, while the appellant "*opted and was steadfast on vertical bumping*" and that there was no persuasive evidence as to why horizontal bumping was not viable. Mr Sesing testified that the proposal of vertical bumping was made by NUMSA; the appellant had not initially intended to bump employees in the cutting and calibration departments with less service than the employees. He gave evidence of the appellant's agreement to NUMSA's proposal, and the investigation that was undertaken to identify the two employees in the cutting and calibration department who would be bumped on account of their lesser service, using criteria that were agreed by NUMSA. The identified employees were both members of NUMSA. There was thus agreement that vertical bumping was to be applied, at least until NUMSA demanded that the employees be placed in lower-graded posts at their existing, higher, salaries. Further, Sesing testified that the appellant had in fact given consideration to horizontal bumping, but that there were no positions, on a horizontal level, in which the employees could be accommodated. This evidence was not seriously challenged.

[19] I thus fail to appreciate how it can be said that the appellant's conduct can be described as unfair. Ultimately, the employees were not retrenched on account of any failure by the appellant to apply horizontal bumping. There was agreement with NUMSA on the application of the principle of vertical bumping. NUMSA must have realised at the time that it made the bumping proposal that the employees would be placed in positions of a lower status, with a commensurate lower rate of pay. Despite this agreement, NUMSA belatedly demanded that the employees be retained at their existing salaries. It was not unfair for the appellant to refuse to agree to that demand, and the ultimate retrenchment of the employees was not unfair. The appeal thus stands to be upheld.

Order

1. The appeal is upheld.

2. The order of the Labour Court is set aside and substituted with the following order:

'1. The applicants' dismissal was substantively and procedurally fair.

2. The referral is dismissed.'

3. There is no order as to costs.

A van Niekerk JA

Savage ADJP *et* Musi JA concur.

APPEARANCES:

FOR THE APPELLANT:	Adv. B Rode
Instructed by	Jansen Van Vuuren Attorneys
FOR THE RESPONDENTS:	Self