



THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JA111/2023

In the matter between:

**SOUTH AFRICAN COMMERCIAL CATERING AND
ALLIED WORKERS UNION OBO THAGE & 28 OTHERS**

Appellant

and

CONNECT FINANCIAL SERVICES (PTY) LTD

Respondent

Heard: 14 May 2024

Delivered: 5 August 2024

Coram: Savage ADJP, Musi and Van Niekerk JJA

JUDGMENT

SAVAGE, ADJP

Introduction

- [1] This appeal, with the leave of the Labour Court, is against the judgment and order of the Labour Court in terms of which the dismissals of 29 employees (the employees) who are members of the appellant, the South Africa Commercial Catering and Allied Workers Union (SACCAWU), on grounds of operational requirements by the respondent were found to be substantively fair. The appeal

turns on whether alternatives existed to the retrenchment of the employees, on whose behalf SACCAWU acts in the matter.

[2] The employees were employed by the respondent, Connect Financial Services (Pty) Ltd, a subsidiary company within the JD Group of companies. The respondent consists of two divisions: a credit division which processes loan applications made by customers in the various JD Group retail stores; and a collections call centre which interfaces with customers regarding loan repayments and other related issues. The functions of the two divisions and the conditions of employment of employees within each division are different. Credit division employees earn a higher basic salary with no incentives and are not target-driven, whereas call centre employees earn a lower basic salary which is incentive and target driven.

[3] The respondent gave notice in terms of sections 189(3) of the Labour Relations Act (LRA)¹ to 118 employees in the credit division of proposed restructuring and contemplated retrenchments. Only the respondent's credit division was affected by the proposed restructuring, which followed a downturn in the volume of work and revenue of the credit division, with fewer customers seeking credit, the automation of loan processing systems, increased business inefficiencies and the reduced need for the processing of loans by an employee in the credit division. The notice recorded that 50 vacant positions were to be available in the division and that 68 employees risked retrenchment.

[4] The notice stated that "*re-deployment elsewhere in the Group*" was an alternative to retrenchment, subject to vacancies within the Group and "*the affected employee's willingness to accept the alternative work opportunity*". The proposed selection criteria identified in the notice were the retention of skills followed by LIFO.

[5] In accordance with section 189(5), four facilitated consultation meetings were held between SACCAWU and the respondent on 24 July 2020, 3, 6 and 17 August 2020. At these meetings, the rationale for the restructuring was not in dispute. It was agreed that affected employees would be assessed for

¹ Act 66 of 1995, as amended.

appointment into the 50 available positions in the credit division and that no employee would need to apply for such positions. Following the assessment process, 50 employees were placed into these vacancies and on 20 and 24 August 2020, the employees who had not been placed were issued with retrenchment notices.

- [6] On 1 September 2020, the respondent advertised 25 vacancies in its call centre division. There is no dispute that SACCAWU was informed of these vacancies, for which the employees were invited to apply, but that they elected not to apply. On 4 September 2020, SACCAWU wrote to the respondent demanding that the retrenched employees be reinstated into these advertised call centre vacancies.
- [7] The respondent replied to SACCAWU on 9 September 2020, detailing how these vacancies had arisen and inviting the employees to apply for the posts. None of the employees applied and the respondent refused to reinstate the employees on the basis demanded by SACCAWU.
- [8] On 21 September 2020 SACCAWU launched an urgent application in the Labour Court in terms of section 189A(13) in which it took issue with the procedural fairness of the retrenchments, claiming that the respondent had not advised it of the call centre vacancies during the consultation process, although the respondent had been aware of these vacancies before retrenching the employees. It contended that the respondent had failed to consult with it on the vacancies and had failed to place the employees into such positions as an alternative to retrenchment.
- [9] On 22 October 2020, the Labour Court (per Mahosi J) dismissed the section 189A(13) application, finding that the record showed that in a consultation meeting on 6 August 2020 the parties had agreed to draw a distinction between vacancies in the credit division, in which 50 positions were available, and vacancies in other divisions. The Court found that it had been agreed by the parties that unlike in the credit division where no applications were required for placement, there would be no automatic placement into vacancies outside of the credit division. The result was that employees were required to apply for

positions outside of the credit division in order to be assessed for possible placement. The appellants were refused leave to appeal this judgment and their petition for leave to appeal similarly failed.

[10] The appellants thereafter referred an unfair dismissal dispute to the Labour Court for determination in terms of section 189A(1), read with section 191(5)(b). In their statement of claim, the appellants challenged the substantive fairness of the dismissals on the basis that the respondent had refused to explore and offer early retirement to 11 qualifying employees; failed to disclose 25 vacancies within its call centre to the appellants, consider such vacancies as an alternative to retrenchment and offer the vacant posts to the employees as an alternative to retrenchment; and that it had diverted the workload to another entity within the group.

[11] In relation to the 25 posts, which is the only issue before this Court on appeal, the appellants stated that:

‘12. On or before 31 August 2020, prior to the effective date of the dismissals of the SACCAWU members, the respondent was aware that 25 vacant posts were available in its call centre.

13. The respondent did not advise the SACCAWU members or [SACCAWU] of the vacant posts, it did not consider the vacant posts as an alternative to the retrenchment of the SACCAWU members, and it did not offer the vacant posts to the SACCAWU members as an alternative to retrenchment.’

Judgment of the Labour Court

[12] The evidence of the respondent's witnesses before the Labour Court was that the 25 vacancies which became available following the retrenchment of the employees were only advertised on 1 September 2020 due to the expiry of temporary contracts in the call centre when it was decided to convert the positions into permanent posts. Although the retrenched employees were informed of these vacancies, which were distinct from those in the credit division in that they had lower salaries, were target-driven and were subject to different working conditions, none of the employees applied for any such

vacancies. In contrast, SACCAWU's case was that during the four facilitation meetings, the respondent had failed to disclose the vacancies in the call centre and that the respondent was aware that call centre agent numbers had been whittling down from April 2020, with it known that temporary contracts were ending on 31 August 2020.

[13] The Labour Court found that the respondent had participated in the facilitated consultation meetings in good faith and complied with the agreement reached in the consultation meeting of 6 August 2020, that a distinction would be drawn between the 50 vacancies in the credit division which arose in the course of restructuring, and vacancies in other divisions in respect of which employees were required to apply. The Court found that employees were invited to apply for vacancies in the call centre, but that they did not do so given that it was not in dispute that the positions were at a much lower level and salary than those in the credit division "*and that [SACCAWU's] members were not interested in applying for them*". As a result, the Court found that the vacancies were not an alternative to avoid retrenchment. The Court found that in any event, the issue was *res judicata* as it had been determined as a procedural one by Mahosi J in the section 189A(13) application.

[14] The retrenchment of the employees was found to have been a last resort since an effort had been made to place 50 employees and that this Court has confirmed that the non-placement of an employee pursuant to a placement process is a valid selection criterion for retrenchment, provided the placement process itself is fair and objective. The appellants' contention that the respondent had failed to disclose and appoint the employees was found to be far-fetched and the retrenchment of the employees was found to be substantively fair.

On appeal

[15] The appellants raised a number of grounds of appeal, which turn on whether the Labour Court erred in finding the dismissal of the employees to be substantively fair when the respondent did not consider the 25 call centre vacancies as alternatives to retrenchment. The appellants contend that these

vacancies were known to the respondent during the facilitation process in August 2020, and ought to have been disclosed and consulted on as an alternative to retrenchment and to have offered the positions to the appellant's members. The appellants contend that the employees ought properly to have automatically filled these vacancies. Further, that the appellants were not informed of the vacancies, nor consulted about them. Despite the respondent's knowledge of such vacancies, the respondent failed to engage in a meaningful consultation process and consulted in bad faith when the 25 vacant positions had been budgeted for, as was evident from the advertisement for the positions, and thus would have formed part of the respondent's three-year strategic cycle. The consultation process was not meaningful, with the retrenchment of the employees not a last resort, and their dismissals were therefore not substantively fair. The appellants therefore seek that the appeal be upheld with costs.

- [16] The respondent opposed the appeal contending that the appellants' earlier application in terms of section 189A(13) had determined certain of the issues raised again on appeal, which issues were *res judicata* as they had been determined by the Labour Court. Furthermore, since it had been agreed between the parties during the consultation process that there would be a distinction drawn between the method of placement of employees into positions in the credit division as opposed to other of the respondent's divisions, after the placements of the 50 employees, the remaining 67 affected employees were required to apply for any positions available. Yet, the employees failed to apply for the positions advertised in the call centre despite having been informed of the vacancies and when the respondent's evidence was that had employees applied for the vacancies advertised, they would have been considered for appointment. The retrenchment of the employees was therefore substantively fair and the appeal must fail.

Evaluation

- [17] The central question raised by the appellants for determination in this appeal is whether the retrenchment of the employees was substantively unfair given that, prior to the dismissal of the employees, the respondent was aware of and later

advertised 25 vacancies in its call centre, which vacancies were not considered as an alternative to the retrenchment.

- [18] Section 189 requires that consultation in the context of contemplated retrenchments must be meaningful and seek to reach consensus on issues including the method for selecting the employees to be dismissed.² During the consultation process, the parties agreed in August 2020 that those employees not placed into positions in the credit division in the course of the restructuring exercise would risk retrenchment unless they were successful in an application for appointment into a vacancy within the group.
- [19] After the employees were retrenched, the appellants approached the Labour Court in terms of section 189A(13) seeking relief on the basis that the respondent had not complied with a fair procedure. Mahosi J dismissed the application on 22 October 2020, finding that it had been agreed by the parties during the consultation process that unlike in the credit division where no applications were required for placement, there would be no automatic placement into vacancies outside of the credit division and that the employees were therefore required to apply for positions outside of the credit division to be assessed for possible placement. The claim that the respondent had not complied with a fair procedure was therefore rejected and the application dismissed. Leave to appeal the judgment was thereafter refused.
- [20] The Labour Court found that the issue which had been before Mahosi J was *res judicata*, a finding on which the respondent relies on appeal. Section 189A(13) was introduced into the LRA to enable the Labour Court to intervene in an ongoing or recently concluded consultation process in order to ensure that a fair process is followed in a large-scale retrenchment exercise. It provides for

² Section 189 provides that:

‘(2) The employer and the other consulting parties must in the consultation envisaged by subsections (1) and (3) engage in a meaningful joint consensus-seeking process and attempt to reach consensus on –

- (a) appropriate measures –
 - (i) to avoid the dismissals;
 - (ii) to minimise the number of dismissals;
 - (iii) to change the timing of the dismissals; and
 - (iv) to mitigate the adverse effects of the dismissals;
- (b) the method for selecting the employees to be dismissed; and
- (c) the severance pay for dismissed employees.’

remedies to be imposed relatively quickly against an employer who does not comply with a fair procedure in such retrenchment processes.³

[21] As a legal doctrine, *res judicata* bars continued litigation on the same case, on the same issues, between the same parties.⁴ The underlying rationale of the doctrine is to give effect to the finality of judgments, limit needless litigation and ensure certainty on matters already decided by the courts.⁵ Mahosi J was called upon by the appellants to adjudicate only the claim of procedural unfairness. Thereafter, the appellants challenged the substantive fairness of the retrenchments in the Labour Court. While a neat distinction between procedural and substantive fairness is not always without difficulty given that the two enquiries are often integrally connected, there can be little doubt that the application before Mahosi related to issues of procedural fairness, whereas the Labour Court judgment on appeal to this Court was concerned with the substantive fairness of the dismissals. This constituted a different cause of action, even if some of the same facts placed before Mahosi J were relied upon and the doctrine of *res judicata* therefore does not apply.

[22] In terms of the agreement reached between the parties, employees not placed within the credit division were not automatically considered for appointment into vacancies outside of the credit division. Instead, it was agreed that they should apply for any available vacancies within the group in order to be assessed for appointment. If not appointed, the employees would then risk retrenchment.

[23] The call centre vacancies advertised on 1 September 2020 fell outside of the credit division. It followed that employees who sought to be considered for appointment into such positions as an alternative to retrenchment were

³ Section 189A(13) provides that:

'If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order –

- (a) compelling the employer to comply with a fair procedure;
- (b) interdicting or restraining the employer from dismissing an *employee* prior to complying with a fair procedure;
- (c) directing the employer to reinstate an *employee* until it has complied with a fair procedure;
- (d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate.' [Own emphasis added].

⁴ *S v Molaudzi* [2015] ZACC 20; 2015 (2) SACR 341 (CC) at para 14.

⁵ *Molaudzi* at para 16; *Ka Mtuze Technology Group South Africa (Pty) Ltd and Others* [2013] ZACC 31; 2013 (12) BCLR 1358 (CC) at para 18.

required, by virtue of the agreement between the parties, to apply for placement into such positions. This much was conceded by the appellants' only witness at the trial.

[24] The respondent's undisputed evidence at trial was that the call centre vacancies arose following the expiry of a number of fixed-term contracts in the call centre on 31 August 2020. Although the appellants take issue with the date on which the respondent was aware of these vacancies, there is no dispute that the appellants were informed of the vacancies once these were available, with the employees invited to apply for such positions. They elected not to do so. The appellants' contention that the call centre vacancies ought to have been consulted on as an alternative to retrenchment and offered to the employees overlooks the terms of the agreement reached between the parties, as well as the fact that the vacancies arose following the conclusion of the consultation process between the parties and on expiry of a number of fixed-term contracts in the call centre. The fact that the vacancies may have been budgeted and formed part of the respondent's three-year strategic cycle, does not alter this fact. The respondent, given the agreement reached between the parties, was not obliged to consult on or automatically place the employees into the call centre or any other vacancies which existed. The Labour Court cannot be faulted for rejecting the appellants' contention that the consultation process between the parties was not meaningful, was undertaken in bad faith or that in adhering to the terms of the agreement reached, informing the appellants of the vacancies and inviting the employees to apply for such positions, the respondent failed to on its own initiative take appropriate measures to avoid dismissals.⁶

[25] In finding the dismissal of the employees substantively fair, the Labour Court did not err. The appeal cannot therefore succeed and, having regard to considerations of law and fairness, no costs order is warranted.

[26] In the result, the following order is made:

⁶ See *SA Chemical Workers Union & others v Afrox* (1999) 20 ILJ 1718 (LAC).

Order

1. The appeal is dismissed with no order as to costs.

SAVAGE ADJP

Musi JA and Van Niekerk JA agree.

APPEARANCES:

FOR THE APPELLANT:

Z M Navsa

Instructed by Dockrat Attorneys

FOR FIRST RESPONDENT:

S Snyman of Snyman Attorneys