



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA78/2019

In the matter between:

MTN GROUP MANAGEMENT SERVICES (PTY) LTD

Appellant

and

SPHIWE MWELI

First Respondent

OLGA NAKEDI

Second Respondent

Heard: 17 November 2020

Delivered: 8 December 2020

Coram: Davis JA, Murphy and Savage AJJA

JUDGMENT

SAVAGE AJA

- [1] This appeal, with the leave of this Court, is against the judgment and orders of the Labour Court (Moshoana J) delivered on 22 May 2019 in which the retrenchment of the respondents by the appellant, MTN Group Management Services (Pty) Ltd, was found to be substantively unfair. The appellant was ordered to re-employ the first respondent, Mr Sphiwe Mweli, into any suitable position in the appellant's Group Business Risk Management ('BRM') division effective from the date of his dismissal, with Mr Mweli to return the severance

pay received by him. The appellant was ordered to pay the second respondent, Ms Olga Nakedi, 12 months' compensation by the appellant. There was no costs order made.

[2] The respondents were employed in the appellant's Group Business Risk Management ('BRM') division on 1 October 2010 and 12 January 2009 respectively, Mr Mweli as Senior Manager: Risk Support and Ms Nakedi as Senior Manager: Audit and Risk Support. During 2015, the BRM division, which included internal audit, fraud risk management and risk management, was reviewed by Ernst & Young ('EY'). This followed the appellant's decision to strengthen its governance, including in risk management, after a USD5.2 billion fine imposed on the MTN Group in Nigeria placed a spotlight on the appellant's controls. In its review, EY found that the BRM function should be strengthened and recommended that the division be restructured. On 27 November 2015, the appellant's audit committee accepted this recommendation.

[3] On 5 February 2016, the appellant gave notice in terms of section 189(3) of the Labour Relations Act 66 of 1995 ("the LRA") to all 15 employees in the BRM division inviting them to consult. The notice stated that the restructuring of the division was aimed at responding to the evolving business model and strategy of the appellant, to address "gaps and inefficiencies" and realign the BRM function to the needs of the business, the Group Audit and Risk Committee and shareholders. It was stated that nine employees were likely to be affected with it expected that at least five employees may be retrenched. The selection method proposed in the event that retrenchment was unavoidable was stated as -

'...to retain skills that are best suited to the positions available in the new structure and, where potential candidates are considered equal in terms of skills and suitability for a limited number of positions, to apply LIFO (Last In First Out)'.

[4] Consultations between the appellant and BRM employees took place on 11 February 2016, 25 February 2016 and 10 March 2016. The new organisational structure was finalised and the services of a consultant used to map employee positions between the old and new structures. Where there was an overlap of

60% or more between the duties and responsibilities associated with a position in the old structure and that in the new structure, the incumbent of the position in the old structure was placed into the corresponding position in the new structure. Where there was no such overlap, no automatic placement into the new structure occurred and the employee became an affected employee. No objection was raised by any employee during consultations to the mapping process.

- [5] The positions held by nine employees, including the respondents, were not mapped into the new structure and they became affected employees. On 14 March 2016, Mr Varun Singh, the Human Resources Partner for the BRM division, forwarded job profiles of positions in the new structure to staff. This was followed by one-on-one consultations with affected employees, who were invited to apply for positions in the new structure. Mr Mveli applied for three positions: Senior Manager Business Continuity and Crisis Management; Senior Manager Risk Management; and Senior Manager Risk Analytics and Modelling. Ms Nakedi applied for the positions of General Manager: Operations and Shared Services and the ERM Senior Manager: Risk Management.
- [6] Both respondents were interviewed by a panel consisting of subject experts and human resources representatives, with interview guides having been drawn up for the panel. The same panel interviewed and scored all candidates for a position, with a psychometric report prepared by an external organisation in respect of each candidate in line with the appellant's approach to recruitment. The respondents, as risk management generalists, following interviews, were found not suitable for the specialised risk management roles for which they applied and were not appointed. No other suitable positions were found to be available within MTN South Africa and, with effect from 30 May 2016, the respondents were retrenched.

Unfair dismissal claim

- [7] Aggrieved with their dismissals, the respondents referred a dispute to the Labour Court. Their statement of claim was unclear and the basis on which relief was sought was confused. It set out that the matter concerned an unfair

labour practice dispute in terms of section 185 of the LRA, read in conjunction with section 77(3) of the Basic Conditions of Employment Act 75 of 1997 ('the BCEA') and "*further alternatively in terms of section 6 of the Employment Equity Act 55 of 1998*". The appellant was said to have breached its own policies and the law, alternatively discriminated against the respondents by displaying racism and favouritism in the new structure, with black senior managers having been retrenched. It was stated that the respondents had been victimised, that their positions were "*not redundant yet offered to other employees*", that the appellant had abused its authority, verbally attacked and intimidated the respondents and handled conflicts of interest and ethical issues improperly with the principle of Last-In-First-Out ('LIFO') not applied and suitable vacancies not made available to the respondents. This was so in spite of the fact that the respondents possessed the necessary skills and had long service.

[8] The statement of claim continued that the section 189 consultation process did not include "*proper consultation*", with the respondents "*replaced by 19 new employees*", and with whites and Indians not affected by the restructure but "*offered new positions without re-applying or being interviewed*" which amounted to discriminatory conduct. The legal issues in dispute were then detailed to be:

- i. the selection criteria used to determine which employees were dismissed had to be agreed and, if they were not, were required to be fair and objective;
- ii. the appellant had failed to comply with section 189(3) of the LRA;
- iii. the business rationale for the restructuring was not provided when the number of employees doubled from 15 to 34; and
- iv. the appellant failed to hold consultation with employees when retrenchment was contemplated or avoid retrenchments.

[9] The respondents sought a finding that their dismissals were procedurally and substantively unfair "*and amounted to unfair labour practice on the part of the [appellant]*"; and discriminatory conduct in terms of section 6 of the EEA.

Retrospective reinstatement and “*just and equitable*” remuneration from 30 May 2016 was sought, with costs on an attorney and client scale.

- [10] The appellant opposed the claim. It denied that the respondents’ dismissals had been unfair or that any unfair labour practice or discrimination had been committed. It stated that the respondents had been consulted in an “*engaging, meaningful and consensus driven*” manner regarding the restructuring of the division, the rationale for the restructure, the new organogram, the mapping process and criteria, the advertisement of posts and the interview and selection process and proposed retrenchments. Representations made by Ms Nakedi during the consultation process were considered and both respondents, as affected employees, applied for available positions in the new structure. After their applications for appointment into alternative positions were unsuccessful, notice of retrenchment was given to the respondents. While only the respondents were retrenched, it was denied that they had been discriminated against or victimised.

Pre-trial minute

- [11] In the pre-trial minute concluded by the parties it was recorded that:

‘The Applicants allege that:

- 3.1 They were dismissed unfairly based on operational requirements.
- 3.2 The respondent did not consult with the Applicants as required by the LRA section 189(2).
- 3.3 There were no meaningful consultations as the Respondent proceeded unilaterally to retrench.

Respondent alleges that:

- 3.5 The Respondent alleges that it acted fairly and followed a fair process in accordance [with] the provisions of the LRA.
- 3.6 The Applicants were not unfairly dismissed but they were dismissed for legitimate reasons related to the operational requirements of the Respondent.

- 3.7 On 5 February 2016, the respondent issued a section 189(3) notices to the Applicants.
- 3.8 The respondent denies that there was no consultation prior to the dismissal of the Applicants.
- 3.9 As stated above section 189(3) notices were issued to the Applicants inviting the applicants to consult with the Respondent.
- 3.10 The Respondent held four consultation sessions with the Applicant and affected employees on 11 February 2016, 25 February 2016, 10 March 2016 and 14 March 2016.
- 3.11 In all four consultation sessions, the affected employees, including the Applicants, we are invited to make representations in respect of the proposed structure, the rationale for the restructuring and further consultation topics.'

[12] The employees' case was stated to be that:

- 5.1 their dismissals were substantively and procedurally and unfair;
- 5.2 they were not given enough interview time when considered for positions in the new structure and that "others were preferred over them";
- 5.3 no-one should have been retrenched, with the rationale for the restructuring in issue;
- 5.4 they were not consulted;
- 5.5 they did not know the reasons why they were selected for retrenchment, with the mapping process not explained;
- 5.6 the selection criteria were not fairly applied relative to them; and
- 5.7 they are suitably qualified for their positions.

[13] The issues for the Court to decide were recorded as:

- ‘4.1 Whether there was there was a fair reason for the dismissal of the Applicants on the basis of the operational requirements of the Respondent.
- 4.2 Whether the dismissal of the Applicants was procedurally and substantively fair.
- 4.3 In the event that the court finds that Respondent had acted fairly, decide what relief the Applicants are entitled to, if applicable.
- 4.4 In the event that Applicants are found to be entitled to the relief sought, the quantum thereof.
- 4.5 Any appropriate costs order.’

Judgment of Labour Court

- [14] The Labour Court accepted on the evidence before it at the trial that there existed a rationale for the restructuring of the BRM division yet found the dismissals substantively unfair on the basis that the selection method applied was not fair and objective. Having not placed the respondents, it stated that the appellant was required to choose a method to select employees for dismissal, which, if not agreed, must be fair and objective. In addition, the Court found that dismissal was not the only viable option since 22 other vacant positions were available.
- [15] With reference to the decision of this Court in *South African Breweries v Louw*,¹ it was stated that the process of attempting to avoid the need to dismiss cannot be equated to the selection method. Having failed to appoint the respondents, the Court stated that the appellant “*was obliged by law to choose the two by applying some selection criteria*”. The Court *a quo* nevertheless found that the selection method applied was that of not having been appointed to the available positions in the new structure, and that this was not a fair and objective. The Court stated that it had not been:

¹ [2017] ZALAC 63; [2018] 1 BLLR 26 (LAC); (2018) 39 ILJ 189 (LAC).

‘.....appropriately appraised of its fair application. The persons who made a decision that the two applicants were not appointable did not testify before this Court. All the court knows is that a panel interviewed the applicants and found them to be unappointable. On what basis they were unappointable, the Court was not told. Whoever made the decision, if he or she was guided by skills retention and best suitability, concluded that the applicants are unskilled and not best suited. One wonders how persons such as the applicants before me, with vast experience in risk and governance, would be without skills and not suited.’

- [16] The dismissals were found to be procedurally fair, with it noted that the attitude of the respondents to the joint consensus-seeking process had been destructive. Turning to the issue of relief, the Court noted that although Mr Mweli sought reinstatement it was uncontested that his position no longer exists. Yet the Court accepted his evidence, not put to the appellant’s witnesses, that the post for which he applied was effectively his position barring a change of title and that such post remained vacant. The Court found that nothing prevented it from ordering the appellant to re-employ Mr Mweli from the date of his dismissal in any vacant position carrying some, if not all, of his functions. The appellant was therefore ordered to re-employ Mr Mweli, who was to return the severance pay received by him “*once the [appellant] pays to him the salary he would have earned from the date of his dismissal*”. Ms Nakedi did not seek reinstatement and the Court ordered that she be paid 12 months’ compensation given that her dismissal was substantively unfair.

Evaluation

- [17] This appeal turns on the correctness of the Labour Court’s finding that the dismissal of the respondents was substantively unfair on the basis that the selection method applied was not fair and objective and that alternatives existed to dismissal; and if the dismissals were unfair, what constituted appropriate relief. Neither the commercial rationale for the dismissal of the respondents, nor the procedural fairness of such dismissals are before this Court on appeal, with no cross-appeal raised against the findings of the Labour Court on these issues.

- [18] The selection criterion used to determine which employees were to be retrenched was the fact of not having been appointed into available positions in the new structure. In finding this selection method unfair and not objective, and that other selection criteria were required to be advanced by the appellant following restructuring, the Labour Court relied upon the case of *IDC v Wolfaardt*.² In that matter, the employer did not invite employees to compete for positions in the new structure, with management handpicking key staff and making block appointments.³ It was found that the filling the posts was open to the charge of arbitrariness, with the process inherently flawed since employees were denied the right to present facts in support of their retention and that the choice made by management was not objective and “probably unfair”.⁴
- [19] Since a legitimate commercial rationale for the restructuring of the BRM division existed, it was not in itself unfair to require affected employees, including the respondents, who enjoyed job security to apply for appointment into the restructured BRM organisational structure. The facts of the current matter are consequently distinguishable from *Wolfaardt*.
- [20] The respondents competed with other affected employees as applicants for positions in the new structure. They determined the positions into which they sought appointment and presented facts in support of their retention. They were interviewed, with other candidates, in a competitive process by an interview panel which, according to the undisputed evidence, adopted a standardised approach to the interviews conducted. Panel members, who included subject experts, scored each applicant on the aspects of the role applied for and had regard to a psychometric evaluation prepared by an external consultant in respect of each applicant, in line with MTN’s Global Talent Standard for senior management roles. Unlike in *Wolfaardt*, management did not handpick staff without interview or appoint staff in a block. The evidence of Mr Singh went unchallenged that in resourcing the new structure the appellant followed its recruitment process which required that employees met the requirements of the job in terms of expert skills, expertise, experience, qualifications and the

² [2002] ZALC 61.

³ At para 29.

⁴ At paras 30 - 31.

psychometric evaluation. The scores given to the respondents by the panel were placed before the Labour Court by the appellant, from which it was apparent that in key areas they had been scored poorly. Neither the interview process, nor the scores, were challenged by the respondents in cross-examination and no reasons were advanced why such scores were unjustified or unfair.

- [21] While the Labour Court found that it had not been properly appraised of a fair application or appointment process in that panel members had not testified, Mr Singh's evidence regarding the process was not disputed. The respondents failed at the trial to make out their case advanced in the pre-trial minute that they were not given enough interview time or that "*others were preferred over them*" and did not put these contentions to the appellant's witnesses in the cross-examination. This is an important omission and one which was repeatedly evident in the respondents' approach to evidence in the matter, more so given the fact that our law is clear that where a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct.⁵
- [22] There was no evidence that the panel had acted unfairly, subjectively, capriciously or in bad faith and no evidence advanced that the appointment criteria were unfairly applied against the respondents. The respondents' claim in the pre-trial minute that they did not know the reasons why they were selected for retrenchment was simply not borne out by the clear evidence advanced by the appellant that the new structure sought a greater degree of specialist skill levels, with a move away from generalist skills. The material aspects of this evidence were left undisputed by the respondents in cross-examination. The result was that on the evidence put up at the trial the finding arrived at by the Labour Court was not supported that, having been unsuccessful in the competitive appointment process, the selection method used to determine which employees were to face retrenchment was unfair and not objective.

⁵ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (CC) at para 61.

- [23] Since selection criteria for retrenchment were not agreed, in terms of section 189(7) such criteria were to be fair and objective.⁶ The selection method proposed by the appellant was indicated in the section 189(3) notice as the retention of skills, with Last-In-First-Out (“LIFO”) to be applied in the event that candidates were found equal in terms of skills and suitability. Although not expressly stated, what was clear from the method proposed was that underlying it was the non-appointment of an affected employee into the new structure as the selection criterion for retrenchment.
- [24] The Labour Court found that the appellant had failed to advance selection criteria for retrenchment after the non-appointment of the respondents. An employer is required by section 189(1), at the point that it contemplates retrenching one or more employees, to consult with employees or their trade unions. It is therefore when retrenchments are contemplated that notice in terms of section 189(3) is to be given inviting consultation. The appellant contemplated retrenchments at the start of a restructuring process, which is the point at which it was required to give such notice. In it the method to be used to select employees for retrenchment was proposed and there was no obligation on the appellant to propose any further criteria after the respondents had been unsuccessful in seeking appointment into the new structure. With the method to select employees for retrenchment having been advanced, there was no evidence before the Court that the criterion used, being the fact of non-appointment, was neither fair and objective.
- [25] Turning to the Court’s finding that dismissal was not the only viable option since 22 other vacant positions were available, the unchallenged evidence of Mr Singh was that vacancies were sought for the respondents within the MTN Group, with their curriculum vitae shared for this purpose, but that suitable positions could not be found. The fact that *any* vacancy existed in the MTN Group did not mean that a such position was suitable for either respondent and did not in itself provide a viable alternative to retrenchment. Mr Singh’s evidence that no alternative positions could be found for the respondents within the

⁶ Section 189(7) provides: ‘The employer must select the employees to be dismissed according to selection criteria – ... (b) if no criteria have been agreed, criteria that are fair and objective’.

appellant or the MTN Group more broadly was not challenged in cross-examination and no details of positions which the respondents claimed were available were put to him by the respondents. In such circumstances, the undisputed evidence was that no viable alternative positions were available as an alternative to retrenchment and in finding differently, the Labour Court erred.

[26] It follows for these reasons that the appellant proved on the evidence before the Court that the retrenchment of the respondents was substantively fair. The orders of the Labour Court consequently fall to be set aside and replaced with an order that the dismissals were fair. Having regard to considerations of law and fairness, this matter warrants no order as to costs.

Order

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

1. The appeal succeeds.
2. The order of the Labour Court is set aside and replaced as follows:

‘The dismissal of the applicants, Mr Sphiwe Mveli and Ms Olga Nakedi, for reasons based on the respondent’s operational requirements was procedurally and substantively fair.’

Savage AJA

Davis JA and Murphy AJA agree.

APPEARANCES:

FOR THE APPELLANT:

Mr M van As

Edward Nathan Sonnenberg Inc.

FOR THE RESPONDENTS:

Mr F Makhanya

Floyd Makhanya Inc.

LABOUR APPEAL COURT