



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JA2/20

In the matter between:

UNATHI VIWE MBEKELA

Appellant

and

AIRVANTAGE (PTY) LTD

Respondent

Heard: 9 September 2021

Coram: Davis, CJ Musi et Coppin JJA

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date for hand-down is deemed to be 26 November 2021.

Summary

Retrenchment – substantive and procedural unfairness with regards to retrenchments overlap and should not be considered in silos. A failure to consult on ways to avoid retrenchment may lead to substantive unfairness. Order of the court *a quo* that failure to consult led to procedural unfairness only, set aside and replaced with a finding that the dismissal was substantively and procedurally unfair.

JUDGMENT

MUSI JA

- [1] This is an appeal against an order of the Labour Court. It found that the appellant's dismissal was substantively fair but procedurally unfair. The appeal is with the leave of this Court. There is no cross-appeal.

- [2] The appellant was employed by the respondent as a technical support manager, during January 2016. She was dismissed in September 2016 ostensibly for operational reasons. She referred a dispute to the Commission for Conciliation Mediation and Arbitration (CCMA). The matter could not be resolved at conciliation. After a certificate of non-resolution was issued by the CCMA, she referred the dispute to the Labour Court.

- [3] At the Labour Court the issues in dispute were the existence of a dismissal, and if there was a dismissal whether such dismissal was substantively and procedurally fair. The Labour Court found that there was indeed a dismissal and that the dismissal was substantively fair but procedurally unfair. It ordered the respondent to pay the appellant, as compensation, an amount equivalent to four months' remuneration. Aggrieved by that order the appellant unsuccessfully applied for leave to appeal. She successfully approached this Court for leave to appeal.

- [4] The Court *a quo*'s exposition of the facts is not in dispute. On 13 September 2016, the appellant was called to a meeting with Mr Terblanche and Ms Kuper, respectively the Chief Technology Officer and the Chief Operations Officer cum Human Resources Manager of the respondent. During this meeting, that was described as brief by the participants, the appellant's impending retrenchment was discussed. The appellant was unresponsive and did not engage the other parties. At the end of this meeting, the appellant was given a document, dated 12 September 2016, purporting to be a notice in terms of section 189(3)¹

¹ Section 189 states:

(1) When an employer contemplates dismissing one or more *employees* for reasons based on the employer's *operational requirements*, the employer must consult—
 (a) any person whom the employer is required to consult in terms of a *collective agreement*;
 (b) if there is no *collective agreement* that requires consultation—

of the Labour Relations Act² entitled “Notice of Contemplating Retrenchment” (Notice).

- [5] The notice was signed by Mr Terblanche and the appellant. On 14 September 2016, Mr Terblanche offered the applicant a mutual separation agreement that included payment of three months’ salary and a waiver of the applicant’s debt

(i) a *workplace forum*, if the *employees* likely to be affected by the proposed *dismissals* are employed in a *workplace* in respect of which there is a *workplace forum*; and

(ii) any registered *trade union* whose members are likely to be affected by the proposed *dismissals*;

(c) if there is no *workplace forum* in the *workplace* in which the *employees* likely to be affected by the proposed *dismissals* are employed, any registered *trade union* whose members are likely to be affected by the proposed *dismissals*; or

(d) if there is no such *trade union*, the *employees* likely to be affected by the proposed *dismissals* or their representatives nominated for that purpose.

(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*.

(3) The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to—

(a) the reasons for the proposed *dismissals*;

(b) the alternatives that the employer considered before proposing the *dismissals*, and the reasons for rejecting each of those alternatives;

(c) the number of *employees* likely to be affected and the job categories in which they are employed;

(d) the proposed method for selecting which *employees* to dismiss;

(e) the time when, or the period during which, the *dismissals* are likely to take effect;

(f) the severance pay proposed;

(g) any assistance that the employer proposes to offer to the *employees* likely to be dismissed;

(h) the possibility of the future reemployment of the *employees* who are dismissed;

(i) the number of *employees* employed by the employer; and

(j) the number of *employees* that the employer has dismissed for reasons based on its *operational requirements* in the preceding 12 months.

(4) (a) The provisions of section 16 apply, read with the changes required by the context, to the disclosure of information in terms of subsection (3).

(b) In any *dispute* in which an arbitrator or the Labour Court is required to decide whether or not any information is relevant, the onus is on the employer to prove that any information that it has refused to disclose is not relevant for the purposes for which it is sought.

(5) The employer must allow the other consulting party an opportunity during consultation to make representations about any matter dealt with in subsections (2), (3) and (4) as well as any other matter relating to the proposed *dismissals*.

(6) (a) The employer must consider and respond to the representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing.

(b) If any representation is made in writing the employer must respond in writing.

(7) The employer must select the *employees* to be dismissed according to selection criteria—

(a) that have been agreed to by the consulting parties; or

(b) if no criteria have been agreed, criteria that are fair and objective.

² Act 66 of 1995.

to the respondent for training fees (the company previously granted the appellant a loan in order to pay for her tuition fees). The appellant rejected the offer. After the rejection of the mutual separation agreement, the appellant was given an amended notice which included a term waiving the applicant's debt with regard to the tuition fees. It is not in dispute that the appellant signed both the original and the amended notices.

[6] On 19 September 2016, after she obtained advice, the appellant wrote to the respondent requesting it to inform her, *inter alia*, about the selection criteria followed and the measures taken to avoid her retrenchment. On 21 September 2016, the respondent replied as follows:

- '1. All the issues you have raised were dealt with in detail in the s189(3) notice of contemplating retrenchment dated 13th September.
2. The consultation process was discussed with you in the meeting held on the 13th September. We reviewed your skill set and were unable to find an appropriate alternative role within the business based on your skill and salary.
3. It is noted that you have signed and agreed to the terms of the retrenchment on the 14th September.
4. We have tried to accommodate you by in addition to the statutory terms of the retrenchment to write off the debt to the company for training fees paid.
5. Please note that the retrenchment document stands as signed by both parties on 14 September 2016.'

[7] Mr Terblanche testified that during April 2016, the respondent bought the intellectual property rights from a company that developed its software. It took over the code and intellectual property and started rewriting the code for the next generation. This necessitated a change in work methods and structure from the waterfall methodology to the agile methodology. This meant that the respondent did not have to write up big pieces of code and get it tested. It engaged seven highly trained developer operations persons (developers) who

took care of automating all the systems, which made the entire support structure obsolete.

[8] It is common cause that at the time that the appellant was interviewed, the respondent desired to appoint her as its technical support manager or its quality assurance manager. Since the technical support section fell away due to the new structure, the appellant was moved to the quality assurance position during August 2016. The incumbent quality assurance manager was appointed as the operations manager. According to Mr Terblanche, the quality assurance position was not redundant when the appellant was moved into it. The work of the quality assurance manager diminished to the level that the appellant had no work to do. It was then decided to declare that position redundant. This gave rise to the 13 September 2016 meeting.

[9] The Labour Court found that there was a dismissal. It further found that there was no mutual separation agreement and that the appellant's signature on the notices was not an indication of her agreeing to their contents but rather an acknowledgement of receipt of the notices.

[10] It further found that there was a sound and *bona fide* operational rationale for the retrenchment of the appellant. It found that there was a fair reason for the dismissal of the appellant and consequently found that her dismissal was substantively fair. With regard to procedural fairness it found that the appellant was not given enough time to render a considered response or to obtain legal advice. It concluded that:

'While it is clear that the applicant is not an unsophisticated person, the evidence clearly indicates that she was somewhat shocked by the process she was not given a reasonable opportunity to make representations on the issues over which she was inside entitled to consult. This is not sufficient consultation or meaningful joint consensus-seeking, as envisaged in the LRA.'

[11] Mr Voyi, on behalf of the appellant, challenged the court *a quo*'s finding that the dismissal was substantively fair on two bases. First, he contended that the Labour Court based its finding on the testimony of Mr Terblanche in circumstances where that testimony was not put to the appellant during cross-

examination. Second, the Labour Court did not properly consider the fact that the total lack of consultation rendered the dismissal substantively unfair. With regard to the appropriate remedy, he submitted that if we agree that the dismissal was substantively unfair then the appropriate remedy should be reinstatement.

[12] Mr Goslett, on behalf of the respondent, submitted that on the facts and circumstances of this case, the failure to put Mr Terblanche's version to the appellant should not attract a negative inference. He further supported the Labour Court's reasoning and conclusion with regard to the finding of substantive fairness and the order of compensation.

[13] The consequences of a failure to put a version to a witness on a particular aspect are dependent on the facts and circumstances of the particular case. A court should therefore use a contextual approach in determining what consequences to attach to such a failure. In *SARFU*,³ it was said that:

‘As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness’ attention to the fact by questions put in cross examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character ...’⁴

[14] In this matter, the appellant did not testify about the genuineness of the rationale for her retrenchment. Mr Terblanche was indeed the only witness who could and did testify about the rationale. It is clear from the facts and circumstances of this case that it would have served no purpose for the respondent to put Mr Terblanche's version to the appellant. It is something that did not fall within the scope of her knowledge. The appellant's response would inevitably have been that she was not aware of the genuineness or otherwise of the rationale to retrench her. What she knew was that the work that she was doing changed and diminished substantially when the developers took over. Her testimony, on

³ *President of the Republic of South Africa and others v South African Rugby football Union and Others* 2000 (1) SA 1 (CC).

⁴ *Ibid* at para 61.

this aspect, was consonant with that of Mr Terblanche. In my view, nothing turns on this point.

[15] Section 189 of the LRA obliges an employer who contemplates dismissing one or more employees for reasons based on the employer's operational requirements to consult with such employee or employees. The consultation should take place before a definitive decision to dismiss a particular employee or employees has been made. The reason why the consultations should occur at the contemplation stage is because the parties must endeavour, during the consultation, to jointly reach consensus on *inter alia* the measures, if any, to avoid the impending dismissal.

[16] The employer is furthermore obliged to issue a written notice inviting the employee to consult with it and it should disclose to the employee all relevant information so that the employee can meaningfully engage with the employer. The consultation is not a one-way communication where one speaks and the other listens. The employee should be given the opportunity to make representations and the employer must consider and respond to the representations made by the employee. If the employer disagrees with the employee's representations, the employer must state the reasons for the disagreement. It is only after consultations have been exhausted, that the employer should retrench.

[17] In *General Foods Industries Ltd v FAWU*,⁵ this Court said:

'After consultations have been exhausted the employer must decide whether to proceed with retrenchment or not. The loss of jobs to retrenchment has such a deleterious impact on the life of workers and their families that it is imperative that, even though reasons to retrench employees may exist, they will only be accepted as valid in the employer can show that all viable alternatives have been considered and taken to prevent the retrenchment or to limit this to a minimum.'⁶

⁵ (2004) 7 BLLR 667 (LAC).

⁶ Ibid at para 55.

- [18] When the employer decides to retrench it becomes the court's duty to determine the fairness of the dismissal objectively. In making that determination, the court must always be mindful of the fact that "the resort to dismissal especially a so-called no-fault dismissal, which some regard as a death penalty in the field of labour and employment law, is meant to be a measure of last resort."⁷
- [19] The architectural foundation on which the edifice of our law relating to retrenchments is built is the saving of jobs by taking sufficient steps to avoid dismissals. Where it is clear that no steps were taken in order to avoid a dismissal such dismissal would be without a fair reason. It is difficult to discern how a dismissal which could have been avoided but was not can only impact procedural fairness. Substantive and procedural fairness issues, with regard to retrenchments, may and do often overlap. They are, in most cases, interlinked. Whether a failure to follow a particular procedure would lead to substantive unfairness depends on the facts and circumstances of each case.
- [20] The court *a quo* evaluated substantive and procedural in silos. It endeavoured to draw a clear and sharp dividing line between substantive and procedural fairness. This was unhelpful. It did not consider whether the failure to jointly consider ways to avoid the dismissal rendered it substantively unfair, even in circumstances where there is a genuine rationale to retrench.
- [21] Even if there was a fair rationale to retrench the appellant, no proper attempt was made to allow her to give input about her own destiny in an attempt to avoid her dismissal. She was given the notice after the respondent purportedly consulted with her. When she was unresponsive during the meeting, she was not given information on which to make an informed decision.
- [22] It is telling that the notice ends with the following sentences: "it is unfortunate that we all find ourselves in this position. We wish everything of the best in your new endeavours." This is a clear indication that the appellant was confronted with a *fait accompli*. The die was cast. The employer's mind was made up before it even gave the appellant an opportunity to make representations.

⁷ Chemical Workers Industrial Union v Algorax (2003) 24 ILJ 1917 (LAC) at para 70.

[23] The disregard for the appellant's rights was so egregious that I cannot find that alternatives to dismissal was indeed considered. In my view, the court *a quo* should have found that the dismissal was substantively and procedurally unfair.

[24] With regard to remedy, the appellant submitted that she should be reinstated.

[25] The respondent submitted that the continued employment relationship between the parties will be intolerable. It further submitted that it is not reasonably practicable for the respondent to reinstate or re-employ her. In substantiation, the respondent contended that too much time has gone by since the dismissal and there is no position to reinstate her in. It also pointed out that at the rate of her salary at dismissal her back-pay would be approximately R1 750 000.

[26] Section 193 of the LRA reads as follows:

'(1) If the Labour Court or an arbitrator appointed in terms of *this Act* finds that a *dismissal* is unfair, the Court or the arbitrator may—

(a) order the employer to reinstate the *employee* from any date not earlier than the date of *dismissal*;

(b) order the employer to reemploy the *employee*, either in the work in which the *employee* was employed before the *dismissal* or in other reasonably suitable work on any terms and from any date not earlier than the date of *dismissal*; or

(c) order the employer to pay compensation to the *employee*.

(2) The Labour Court or the arbitrator must require the employer to reinstate or reemploy the *employee* unless—

(a) the *employee* does not wish to be reinstated or reemployed;

(b) the circumstances surrounding the *dismissal* are such that a continued employment relationship would be intolerable;

(c) it is not reasonably practicable for the employer to reinstate or reemploy the *employee*; or

(d) the *dismissal* is unfair only because the employer did not follow a fair procedure.

(3) If a *dismissal* is automatically unfair or, if a *dismissal* based on the employer's *operational requirements* is found to be unfair, the Labour Court in addition may make any other order that it considers appropriate in the circumstances.

(4) An arbitrator appointed in terms of this Act may determine any unfair labour practice *dispute* referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, reemployment or compensation.'

[27] It is trite that reinstatement is the primary remedy for a substantively unfair dismissal. In *Booi v Amathole*,⁸ the primacy of the remedy was underscored. Khampepe J explained it thus:

'The primacy of the remedy of reinstatement is no coincidence. It is the product of a deliberate policy choice adopted by the Legislature.'⁹

[28] The respondent's contention that the continued employment relationship between the parties will be intolerable, is without merit. This was a no fault dismissal. Mr Terblanche testified that he bears the appellant no ill will. There is no evidence on record about any bad relationship between the employer and the employee. The employer bears the onus to prove the intolerability of the relationship. The high bar of intolerability means that a finding of intolerability should not be made lightly. This is so because:

'(T)he term "intolerable implies a level of unbearability, and must surely require more than the suggestion that relationship is difficult, fraught or even sour. This high threshold gives effect to the purpose of the reinstatement injunction in section 193 (2), which is to protect substantively unfairly dismissed employees by restoring the employment contract and putting them in the position they would have been in but for the unfair dismissal. And, my approach to section 193 (2) (b) is fortified by the jurisprudence of the Labour appeal Court and the Labour Court, both of which have taken the view that the conclusion of

⁸ *Booi v Amathole District Municipality and Others* (CCT 119/20) [2021] ZACC 36 (19 October 2021).

⁹ *Ibid* at para 39.

intolerability should not easily be reached, and that the employer must provide weighty reasons, accompanied by tangible evidence, to show interrupt tolerability.¹⁰

[29] The respondent has not even come near to showing that the relationship between the two would be intolerable. It provided no reasons and no tangible evidence to that effect. I now turn to consider whether it would be reasonably practical to reinstate the appellant.

[30] Like with intolerability, the employer bears the onus to demonstrate that it would not be reasonably practicable to reinstate the employee. The reinstatement remedy, in cases where the dismissal was found to be substantively unfair, should not be displaced for flimsy reasons or where there is insufficient evidence to justify a deviation from the primary remedy. In *Xstrata*,¹¹ the court said the following about section 193 (2) (c):

‘the object of section 193 (2) (c) of the LRA is to exceptionally permit the employer leave when it is not practically feasible to reinstate; for instance, where the employee’s job no longer exists, or the employer is facing liquidation, relocation or the like. The term not reasonably practicable in section 193 (2) (c) does not equate with “practical”, ... It refers to the concept of feasibility. Something is not feasible if it is beyond possibility. The employer must show that the possibilities of the situation make reinstatement inappropriate. Reinstatement must be shown not to be reasonably possible in the sense that it may be potentially futile. And employee’s length of service, the delay in the arbitration and alleged untested shortcomings in capacity are not normally relevant to the question of practicability ...’¹²

[31] A finding that it would not be reasonably practicable to reinstate an employee must therefore be preceded by a proper evaluation of the employer’s circumstances and means more than ‘inconvenience and requires evidence of a compelling operational burden’.¹³

¹⁰ Ibid at para 40.

¹¹ *Xstrata South Africa (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers obo Masha* [2017] 4 BLLR 384 (LAC).

¹² Ibid at para 11.

¹³ *South African Commercial, Catering and Allied Workers Union and Others v Woolworths (Pty) Limited* 2019 (3) SA 362 (CC) at para 49.

- [32] The uncontested evidence in this matter is that both the technical and the quality assurance division are no longer operational. The appellant can therefore not be reinstated in any of the positions that she previously held.
- [33] The appellant was dismissed during September 2016. It is common cause that the appellant is currently employed. She was unemployed for a period of 12 months after the dismissal. She has been employed for a period of four years after the dismissal (since 2017). Although she expressed a desire to be reinstated, it is clear that she has moved on.
- [34] I am convinced that reinstatement would not be reasonably practicable under the circumstances. The respondent has shown that it is operationally impossible to reinstate the appellant. I am therefore constrained to exercise my discretion against the appellant.
- [35] I am, however, of the view that she must be compensated. The finding that the dismissal was substantively unfair means that we are at large to interfere with the Labour Court's compensation order. Due to the egregious manner in which this dismissal was effected, I am of the view that the appellant should be awarded the maximum compensation. It is the most appropriate and fair remedy.
- [36] There are no circumstances which militate against the general rule in labour disputes that no costs order should be made.
- [37] I accordingly make the following order:
1. The appeal is upheld with no order as to costs.
 2. The Labour Court's order is set aside and replaced with the following:
 - 2.1 The applicant's dismissal was substantively and procedurally unfair.
 - 2.2 The respondent is ordered to pay the applicant an amount of compensation equivalent to 12 months' remuneration calculated as

at date of dismissal. The said amount to be paid to the applicant within one month of the date of this order.

2.3 There is no order as to costs.

C.J. Musi, JA

Davis JA and Coppin JA concur with CJ Musi JA.

APPEARANCES:

FOR THE APPELLANT: Mr NP Voyi
Instructed by Ndumiso Voyi Incorporated,
Midrand.

FOR THE RESPONDENT: Adv R Goslett
Instructed by Dewey Hertzberg Levy Inc.,
Sandton.