



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

JA 25/22

In the matter between:

BRYAN DAVID SELVAN

Appellant

and

CROSSROADS DISTRIBUTION (PTY) LTD

Respondent

Heard: 24 November 2022

Delivered: 16 January 2023

Coram: Sutherland JA, Coppin JA and Phatshoane AJA

JUDGMENT

SUTHERLAND JA

Introduction

- [1] The appellant, Bryan Selvan (Mr Selvan) was the Human Resources (HR) manager of the respondent, Crossroads Distribution (Pty) Ltd (CD). He was retrenched with effect from 30 June 2016. Aggrieved by this decision, Mr Selvan contended that the dismissal was in breach of s 189 of the Labour Relations

Act¹ (LRA) being both procedurally and substantively unfair. The matter was heard by Mabaso AJ in the Labour Court, who, on 14 October 2021, dismissed the claims. This is the judgment on appeal before this Court.

- [2] The case has had a tortuous passage with many controversies arising. In this judgment, attention is given to the critical issues only.

Critical facts

- [3] The core facts are common cause. CD was one of several corporate affiliates in a Group of Companies. The business of CD is the transport of goods by truck. A valuable client failed to perform appropriately and revenue flow was imperilled. The scale of the operations became unsustainable. In 2015, it became apparent that a reduction in costs and the elimination of staff surplus to requirements was unavoidable. Mr Selvan, self-evidently, as HR manager, was the lead management figure in driving the process. Because of the scale of the contemplated retrenchment a s 189A process was embarked on.² This

¹ Act 66 of 1995, as amended.

² S 189A of the LRA: The relevant provisions are cited; provisions relating to strikes are omitted.

'Dismissals based on operational requirements by employers with more than 50 employees –

(1) This section applies to employers employing more than 50 *employees* if –

(a) ...

(b) the number of *employees* that the employer contemplates dismissing together with the number of *employees* that have been dismissed by reason of the employer's *operational requirements* in the 12 months prior to the employer issuing a notice in terms of section 189 (3), is equal to or exceeds the relevant number specified in paragraph (a).

(2) In respect of any dismissal covered by this section –

(a) an employer must give notice of termination of employment in accordance with the provisions of this section;

(b) ...

(c) the consulting parties may agree to vary the time periods for facilitation or consultation;

(d) a consulting party may not unreasonably refuse to extend the period for consultation if such an extension is required to ensure meaningful consultation.

(3) The Commission must appoint a facilitator in terms of any regulations made under subsection (6) to assist the parties engaged in consultations if –

(a) the employer has in its notice in terms of section 189 (3) requested facilitation; or

(b) consulting parties representing the majority of employees whom the employer contemplates dismissing have requested facilitation and have notified the Commission within 15 days of the notice.

(4) This section does not prevent an agreement to appoint a facilitator in circumstances not contemplated in subsection (3).

(5) If a facilitator is appointed in terms of subsection (3) or (4) the facilitation must be conducted in terms of any regulations made by the *Minister* under subsection (6) for the conduct of such facilitations.

(6) The *Minister*, after consulting *NEDLAC* and the Commission, may make regulations relating to –

(a) the time period, and the variation of time periods, for facilitation;

(b) the powers and duties of facilitators;

is significant because ss (18) excludes any disputes about procedural unfairness being ventilated after the retrenchment process has been completed.

- [4] Staff were retrenched in stages. From January 2016, three stages of retrenchment were driven towards completion. A fourth stage was then embarked upon on 15 April 2016. Hitherto, the staff who had been subjected to the exercise had been the operations rank and file. In the fourth stage, the notice issued alluded pointedly to support staff including “the HR department”.

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- (c) the circumstances in which the Commission may charge a fee for appointing a facilitator and the amount of the fee; and
 - (d) any other matter necessary for the conduct of facilitations.
 - (7) If a facilitator is appointed in terms of subsection (3) or (4), and 60 days have elapsed from the date on which notice was given in terms of section 189 (3) –
 - (a) the employer may give notice to terminate the contracts of employment in accordance with section 37 (1) of the *Basic Conditions of Employment Act*; and
 - (b) a registered *trade union* or the *employees* who have received notice of termination may either –
 - (i) ...
 - (ii) refer a *dispute* concerning whether there is a fair reason for the *dismissal* to the Labour Court in terms of section 191 (11).
 - (8) If a facilitator is not appointed –
 - (a) a party may not refer a *dispute* to a *council* or the Commission unless a period of 30 days has lapsed from the date on which notice was given in terms of section 189 (3); and
 - (b) once the periods mentioned in section 64 (1) (a) have elapsed –
 - (i) the employer may give notice to terminate the contracts of employment in accordance with section 37 (1) of the *Basic Conditions of Employment Act*; and
 - (ii) a registered trade union or the *employees* who have received notice of termination may –
 - (aa) ...
 - (bb) refer a *dispute* concerning whether there is a fair reason for the *dismissal* to the Labour Court in terms of section 191 (11).
 - (9) ...
 - (10) ...
 - (ii) any referral to the Labour Court contemplated by subparagraph (i) that has been made, is deemed to be withdrawn.
 - (11) ...
 - (14) Subject to this section, the Labour Court may make any appropriate order referred to in section 158 (1) (a).
 - (15) An award of compensation made to an *employee* in terms of subsection (14) must comply with section 194.
 - (16) The Labour Court may not make an order in respect of any matter concerning the disclosure of information in terms of section 189 (4) that has been the subject of an arbitration award in terms of section 16.
 - (17) (a) An application in terms of subsection (13) must be brought not later than 30 days after the employer has given notice to terminate the *employee's* services or, if notice is not given, the date on which the *employees* are dismissed.
 - (b) The Labour Court may, on good cause shown condone a failure to comply with the time limit mentioned in paragraph (a).
 - (18) The Labour Court may not adjudicate a *dispute* about the procedural fairness of a *dismissal* based on the employer's *operational requirements* in any *dispute* referred to it in terms of section 191 (5) (b) (ii).
- (Own emphasis)

The HR department consisted of 4 persons including Mr Selvan, the head of that department. This notice was issued by Mr Behrens, the Group HR executive, not by Mr Selvan.

- [5] According to Mr Selvan, on 20 April 2016, immediately after he and Mr Behrens, had concluded a consultation with some of the support staff, which did not, in that meeting, include any HR staff, Mr Behrens announced to him that he too was to be retrenched. Mr Selvan says that he was astonished by this news. He had no expectation that his post might become redundant. Moreover, he contends that he had been given no prior warning of that prospect. CD's case is that the allusion to the "HR dept" in the third retrenchment notice was an appropriate notification to Mr Selvan who ought to have appreciated that the notice, logically, must have included him. This is the high point of the respondent's case on proper notice.
- [6] Thereafter, three of the employees in the HR department, including Mr Selvan, were retrenched and one, Ms Jeeva, a skills facilitator, was retained. Mr Behrens and his secretary assumed HR direct roles from their position in the group's management company which managed several subsidiaries, including CD. Several consultations took place with Mr Selvan on a one-on-one basis.

The dispute about procedural unfairness

- [7] The First question that arises is whether Mr Selvan could raise the complaints he had about the procedural unfairness of the retrenchment process as regards himself. He had several distinct complaints about what he regards as a sham consultation engagement over and above the allegation of inadequate notice. Two distinct steps were taken, in turn, by Mr Selvan in prosecuting his grievance.

In the Arbitration

- [8] The first step was to take the dispute to arbitration before the bargaining council, invoking s 191(12) (a) of the LRA and intending to contest both procedural and substantive fairness of his dismissal. That section provides:

'(12) An *employee* who is dismissed by reason of the employer's *operational requirements* may elect to refer the *dispute* either to arbitration or to the Labour Court if –

- (a) the employer followed a consultation procedure that applied to that *employee* only, irrespective of whether that procedure complied with section 189;
- (b) the employer's *operational requirements* lead to the *dismissal* of that *employee* only; or
- (c) the employer employs less than ten *employees*, irrespective of the number of *employees* who are dismissed.'

[9] Before the arbitrator, the point was argued whether this section could apply because, so CD contended, Mr Selvan was not a *single employee* within the contemplation of the provisions of either (a) or (b) because Mr Selvan's retrenchment was one of many pursuant to the process in terms of s 189A. This argument was premised on two possibilities with the same result: i.e., whether Mr Selvan was to be regarded as one of the numbers retrenched over the course of 2016, or more narrowly, as one of three in the HR department who were dismissed, he was not a lone retrenchee. The arbitrator upheld the *point in limine* advanced by CD and ruled that s 191 (12) (a) could not apply to Mr Selvan and that the matter could not be ventilated in the bargaining council.

[10] The arbitrator's ruling binds Mr Selvan. It could have been reviewed. It was not. What is the long-term consequence of this choice? On behalf of Mr Selvan, an argument was advanced that this ruling was relevant only in deciding the jurisdiction of the bargaining council and could not subsequently bind the Labour Court. A dictum from *SA Rugby Players Association and others v SA Rugby (Pty) Ltd and others*³ at para [38] ff was invoked: the proposition is that a decision on whether a forum has jurisdiction by reason of a dismissal having occurred, when taken by an arbitrator, has no reach beyond the immediate question of its own jurisdiction. However, this debate is redundant because

³ (2008) 29 ILJ 2218 (LAC).

whatever the status of the ruling, it had no bearing on subsequent events, other than to precipitate and explain Mr Selvan's next step.

In the Labour Court before Cele J

[11] When the route to the bargaining council was closed by the ruling, Mr Selvan acquiesced therein and thereupon commenced afresh by approaching the Labour Court. Understandably, much time had elapsed and by the time the dispute was brought before the Labour Court, the referral was out of time. Thus, condonation was required to have the case heard. The condonation application was heard by Cele J. He delivered an order on 1 September 2017. The effect of that judgment was to grant condonation for the ventilation of the substantive fairness of the retrenchment and the refuse condonation on the procedural leg. This judgment binds Mr Selvan. It was not appealed. Thus, the only "case" allowed to be ventilated was the substantive fairness leg.⁴

[12] The outcome of these developments is that the opportunity to ventilate procedural fairness, assuming there was a cogent case at all, was denied to Mr Selvan. This outcome is not dependent on the correctness of either the ruling of the arbitrator in the bargaining council or the order and judgment of Cele J; rather, it is solely the result of the existence of the judgment of Cele J who granted limited condonation and the absence of a challenge thereto which could have set that judgment aside.

In the Labour Court before Mabaso AJ

[13] Notwithstanding the effect of the judgment by Cele J, Mr Selvan endeavoured to ventilate the procedural unfairness leg of his case. Mabaso AJ held that only substantive fairness was properly before him. In our view, there was no option open to Mabaso AJ other than to reach this conclusion.

⁴ There was a faint argument that the "order" did not distinguish between procedural and substantive fairness disputes. This is correct but not dispositive of the meaning of the order. Judgments and orders must be read contextually no less than any other document. There is no room to doubt the intent of the order. See from para [48] in judgment; *Selvan v Crossroads Distribution (Pty) Ltd* unreported judgment case no JS182/17 delivered on 3 November 2017.

- [14] It was argued on behalf of Mr Selvan that an amendment to the statement of case to cite s 191(12) had the effect of overcoming the judgment of Cele J. This contention is conceptually unsustainable. To belabour the critical point: without overturning the judgment of Cele J, the procedural unfairness case could not be ventilated.

Conclusion on procedural unfairness

- [15] Accordingly, Mr Selvan could not prosecute a procedural unfairness case: the judgment *a quo* is correct.

The dispute about substantive unfairness

- [16] The need for a retrenchment of staff in CD is itself not in dispute. Indeed, Mr Selvan himself acknowledges that throughout his 12 years of employment, the business of CD did not grow. Put brutally, the business was stagnating. The rationale for the retrenchment exercise extends to Mr Selvan too; there is no distinct rationale at all. The contention is that, because there were distinct consultations held with Mr Selvan, the legal implication is that his retrenchment stood outside the s 189A process, is unsustainable.
- [17] There is an inherent coherence to the retrenchment exercise through its four phases. The stripping out of operations staff step-by-step and, ultimately, decimating the support structure.
- [18] When at the moment of the fourth notice, on 15 April 2016, the 'HR department' was listed, notably, it was listed without qualification. This could mean only that every one of the four members of that HR department were at risk. Mr Selvan can be taken at his word that he was shocked on 20 April to hear that his post was also to be culled. However, that, in context, is not proof that he was not properly alerted. Significantly, the notice of 15 April was one in which he had no input: i.e., it was addressed to him no less than to the other three members of the department. In my view, it is probable that Mr Selvan imagined that he was not at risk because he assumed he was a member of the *de facto* inner circle of management. His guess was wrong.

[19] Moreover, once the HR department was to be shrunk and absorbed into the Group HR function it was axiomatic that there was no room for two managerial roles. Mr Behrens as the Group Executive was clearly going to prevail over Mr Selvan; the commercial sense of that is unassailable. To a certain extent, the debate about selection criteria during the consultations was no more than bluster from both sides, the result of mechanical uninsightful box-ticking. The retention of the skills development facilitator, Ms Jeeva, regardless of LIFO was plainly rational. The notion that some other existing post in the HR department, as restructured, was suitable for Mr Selvan is unsustainable. If he were to become the skills facilitator (a proposal not ventilated in the consultations) would mean both demotion and a degree of re-skilling for Mr Selvan and the bumping of an existing appropriate person in that role.

[20] The contention advanced, that the selection of Mr Selvan and others in the HR department was a *mala fide* contrivance, is unsustainable. The thesis is that they were 'cleared out' to enable persons who were 'outsiders' to be appointed in their stead. The alleged outsiders were Mr Behrens and his secretary who were employed by the filial management company, which together with CD, was a subsidiary of the group holding company. The role of the management company included managing CD. It is untenable to place an 'outsider' construction on these facts. The 'new' HR department members were not outsiders and the byzantine corporate structure of the group offers no grounds to regard them as such.

[21] Accordingly, no case for substantive unfairness has been proven. No doubt there is a subliminal foundation for Mr Selvan to regard the outcome as a betrayal, based on his unfulfilled assumptions about the inter-personal relationships within the managerial echelon, but that founds no purchase in law or equity for a cogent substantive unfairness complaint in terms of the LRA.

[22] No case for substantive unfairness is proven.

Conclusions

[23] The appeal must fail.

[24] As to costs, in our view, the appropriate order is that no cost orders be made.

Order

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

Sutherland JA

Coppin JA and Phatshoane AJA concur.

APPEARANCES:

FOR THE APPELLANT:

Adv. M Meyerowitz
Instructed by Bagraim Sachs Inc.

FOR THE RESPONDENT:

Adv. F Le Roux
Instructed by Van Zyl-Rudd Inc.