

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. JA 23/2000

MOSES BALOYI

Appellant

and

M & P MANUFACTURING

Respondent

JUDGMENT

DAVIS AJA:

[1] On 22 December 1999 **Revelas J** sitting in the Labour Court dismissed the application of the appellant for reinstatement on the grounds of unfair dismissal with costs. With leave of the learned judge the appellant appeals against the order concerned. In terms of Rule 9(3)(a) of the Rules of this Court, the heads of argument of the appellant and the respondent must include a chronology of the material facts. Counsel for both parties failed to comply with this rule rendering the task of identifying the material facts more difficult. The rule concerned is intended to facilitate the work of this court and its breach is a serious matter.

[2] Practitioners should be warned that an appeal court is entitled to refuse to hear an

appeal where there is material non-compliance with an important rule relating to heads of argument and that where such refusal occurs this court may well decide that any wasted costs resulting from such refusal are to be borne by the draftsman.

[3] The appellant was an employee of the respondent until he was dismissed by it on 6 February 1998. The appellant was a member of a trade union which acted as his representative at the respondent's business.

[4] The appellant's dismissal occurred because of the respondent's operational requirements¹ and in terms of provisions of section 189 of the Labour Relations Act 66 of 1995 ("the LRA").

[5] The respondent has a small business run by two brothers Mr Michael John Lawrensen and Mr Paul Edmund Lawrensen. It manufactures wrought iron furniture and decorations for the domestic market. It employs three welding teams normally consisting of welders, grinders and welders' assistants. In her judgment **Revelas J** said that the parties were agreed "that the respondent adopted the LIFO method, together with skills and disciplinary records as the selection criteria for the retrenchment exercise which it embarked on and which it announced to the union and its employees on 20 January 1998".

[6] In the course of her judgment the learned judge rejected the applicant's contention

¹ The term "operational requirements" is defined in section 213 of the LRA to mean "requirements based on the economic, technological, structural or similar needs of an employer;...."

that his dismissal had been automatically unfair. She accepted that the two welders whose services were retained had superior skills to those of the appellant in that the appellant needed supervision, whilst the others did not and further in that he had the least artistic skills which were required for the manufacture of the bulk of the items produced by the respondent. She went on to find that the selection criteria adopted by the respondent were objective and fair. She also found that the respondent had deviated “from LIFO as the sole criterion” and that this had been sufficiently justified by it. In the result she found not only that the dismissal was for a fair reason but that it was also procedurally fair.

[7] Mr Bruinders, who appeared on behalf of the appellant, contended that since the appellant was selected for retrenchment because he was less skilled and less “artistic” than his two colleagues who were not retrenched and because of poor past performance and misconduct the respondent ought to have consulted with him personally. Thus, appellant was denied an opportunity to make representations in support of his skills, past performance, or work record and to question the credentials of the two welders who were retained.

[8] According to Mr M Lawrensen the selection criteria utilised in deciding on the appellant’s retrenchment were “general working skills, retaining employees with superior work skills, records of poor performance, misconduct, absenteeism and...length of service”.

[9] In regard to the company’s manufacturing business he said that it manufactured “decorative wrought iron furniture and household accessories (l)ike lamps, wall sconces, candle sticks and various other decorative ornamental pieces for the home...artistic goods, goods that are not generally available on the side of the road or in normal retail stores”

[10] Mr P Lawrensen testified that the business did not consist of “repetitive work that is done over and over again and he went on to say that every job done by the appellant could be different’ and he needed ‘a certain amount of skill and flair to be able to produce at the maximum””

[11] Mr M Lawrensen said that the other welders “were more intuitive and more qualified to do the work...(showing) more initiative and intuition in assembling and making artistic type of furniture”. He testified that the appellant had “the poorest working skills...(requiring) the most supervision.” He went on to say that the respondent corrected the appellant’s work “on numerous occasions” and that they were “continually assisting and supervising (him) more than the other welders”.

[12] It was common cause that the proposed retrenchments were discussed with representatives of the National Union of Metal Workers of South Africa (“NUMSA”) of whom appellant was a member. During a meeting held between respondent and NUMSA ON 6 February 1998 respondent showed Mr Mabho of NUMSA and applicant’s order book and financial statements on the basis of which the Lawrensens sought to justify to Mabho the reasons for the decision to retrench.

[13] At this meeting respondent insisted that it could not adopt the LIFO principle only as the criterion for retrenchment of a welder because this would entail the retrenchment of another welder who was far superior in ability to appellant.

[14] Notwithstanding that Mr Mabho expressed the dissatisfaction of NUMSA with this decision to retrench appellant and contested the amount and delivery of the information provided by respondent, it is clear from the record that respondent consulted with NUMSA about the retrenchments in the manner prescribed in terms of section 189(1)(c) of the LRA

[15] The nature of the consultation process is described by Mr M Lawrensen in a letter of 6 February 1998 which he addressed to Mr Mhabo as follows:

“As advised the reasons for the retrenchment are as a result 1. of the general downturn in the economy. 2. The decline in the financial position of the company due our failure to secure another hotel order/orders. 3. General reduction in work.

4. Decline in the demand for our products

This has necessitated us having to reduce the number of staff by one production team. We intended retrenching one production team as a whole but after discussions with yourselves we agreed to compromise and retrench Mthetho Mhi and Tobi Mcingeni. It was never our intention to terminate their services as they are outstanding workers, however in the spirit of co-operation we reluctantly agreed.

The criteria which we followed in the selection of the employees we intended to retrench was based on 1. General working skills. 2. Retaining employees with superior work skills to others 3. The records of poor performance, misconduct and absenteeism 4. Length of service.

Using this criteria we decided to include Moses Baloyi as our candidate for retrenchment among the three 'welders'. Notwithstanding the fact that Moses Baloyi was employed prior to Lucky we have had to, in the interests of the company, consider the other criteria which outweigh your LIFO policy. It must be borne in mind that Moses Baloyi was only employed two and three months before the other two 'welders'.

Being a very small company the other criteria besides length of service are very important to us, in fact they could make the difference between success and failure of the company. Moses unfortunately has the poorest working skills, requires the most supervision and has the worst disciplinary record of the three 'welders'. We are therefore of the opinion that it is in the best interest of the company and rest of the employees that Moses Baloyi was selected for retrenchment and will accordingly be retrenched by ourselves.

We confirm that we have as agreed, terminated the services of all our contract workers with immediate effect in line with your policy.

As agreed the retrenchment will take effect on Friday, 6 February 1998 and letters of retrenchment will be handed to Moses Baloyi, Mthetho Mhi, Tobi Mcingeni.

Taking all the above into consideration we believe that the retrenchments and selection of candidates are the only alternative left to us and we trust you will agree that litigation in this regard will be uncalled for."

[16] Wisely Mr Bruinders did not argue that there had been no compliance by

respondent with its duty to consult with NUMSA in terms of section 189(1).

However in developing his argument that, in addition to consulting with NUMSA,

respondent was obliged to afford appellant a hearing, he referred to the testimony

of Mr M Lawrensens to the effect that appellant had not been invited to join the

meeting with NUMSA as he had been nominated as a candidate for retrenchment.

Mr Bruinders contended that this explanation was legally invalid and that

appellant should have been afforded an opportunity to answer allegations about his lack of “artistic flair” and skill as a welder. As respondent had employed subjective criteria in arriving at its decision to retrench appellant, the latter should have been afforded a proper opportunity to counter such subjective assessments.

- [17] In support of this submission Mr Bruinders relied upon a passage in the judgment of **Joffe J in Brenner & Buchman (Pty) Ltd v S A Commercial Catering the Allied Workers Union and Others** (1994) 15 ILJ 604 (LAC) at 609 B-F “Furthermore, it is clear that after the selection process had taken place none of the proposed retrenched employees were given an opportunity of making representations to the appellant. In the circumstances they were entitled to do so and the failure to give them this opportunity also constituted an unfair labour practice. In this regard reference is made to **Rycroft and Jordaan, *Guide to the South African Labour Law***, where the following is stated:

‘In addition to general consultation with worker representatives, there may be a need for individual consultation. The more vague and subjective the criteria adopted for redundancy selection, the more powerful is the need for the employee to be given an opportunity of personal consultation before he is judged by it. In cases where the selection criteria are based on an employee’s performance and past work record, the rules related to procedural fairness in the cases of dismissal based on misconduct or incapacity have been held to apply: retrenched workers should be given the opportunity to ‘defend’ their work records, and to question those of others’.”

[18] The difficulty with applying this *dictum* to the facts of the present case is that it was predicated upon the concept of an unfair labour practice which was central to the legal dispensation regulated in terms of the Labour Relations Act 28 of 1956 [as amended]. Under the LRA the concept of an unfair labour practice is only directly relevant to the transitional arrangements regulated in terms of Schedule 7 to the Act. Accordingly the premise upon which **Joffe J's** judgment is based in **Brenner's** case is not applicable to the present dispute which stands to be decided in terms of the LRA.

[19] A further question was raised as to whether section 185 which provides that every employee has a right not to be unfairly dismissed imports a concept of fairness similar to an unfair labour practice into the LRA. This submission needs to be considered within the context of section 189 of the LRA, subsection (i) which provides, *inter alia*, as follows:

1) When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult

..... (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;

(d) if there is no such trade union, the employee likely to be affected by

the proposed dismissals or their representatives nominated for that purpose.

Section 189(2) provides that” [t]he consulting parties must attempt to reach consensus on

(a) appropriate measures

- i) to avoid 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.”

[20] In short, section 189 (1) provides for the identity of the parties to be involved in the process of consultation with the employer. Section 189(2) sets out the agenda and objectives of the process to be adopted by an employer when the latter contemplates dismissing employees for reasons based upon operational requirements.

[21] Read together, the two subsections represent the codification of the standards which had previously been developed by way of the principle of fairness as contained in the concept of an unfair labour practice. Section 185 may well require that an employer must comply with both the substance and the form of the requirements as contained in section 189, but it adds nothing to the content of the process to be followed.

Given the nature of the detailed codification of the procedure to be adopted for such dismissals, it cannot be said that some residual test remains, notwithstanding that the employer has complied meticulously with the requirements as laid out in section 189(1) and (2).

[22] It was not contended that respondent did not follow the proper procedures in dealing with NUMSA nor, in the light of the meetings to which reference has already been made, could such an argument have been justified. The argument that the appellant should have been afforded a hearing in person in circumstances where the union which represented him had properly been consulted runs counter to the express terms of the section. CF. **Benjamin and Others v Plessey Tellumat SA LTD** (1998) 19 ILJ 595 (LC) at para 31.

[23] In keeping with a premise of the Act, section 189(1) envisages that the collectivities of management and labour represented by trade unions should engage in an appropriate process of consultation, save where the affected employees are not so represented. To interpret the section so as to allow an employee represented by a union to engage in a parallel process of consultation would undermine the very purpose of the section.

[24] In the result the appeal is dismissed with costs.

DAVIS AJA

I agree.

ZONDO JP

I agree.

GOLDSTEIN AJA

For the Appellant: T. Bruinders

Instructed by Cheadle, Thompson & Haysom

For the Respondent: A.J. Nel

Instructed by Snyman van der Heever Heyns Inc.

Date of Hearing: 15 November 2000.

Date of Judgment: 14 December 2000.