

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

CASE NO: JA 40/2002

In the matter between:

L & C STEINMULLER (AFRICA) LTD
Appellant

First

KLOCKNER-BECORIT CORPORATION SA (PTY) LTD
Second Appellant

STEINMULLER MINING & PIPING SYSTEMS (PTY) LTD
Third Appellant

and

HENDRIK SHEPHERD
Respondent

JUDGMENT

WILLIS JA:

[1] The respondent (to whom I shall refer as “the employee”) referred a dispute concerning an alleged unfair labour practice relating to his dismissal by the second appellant to the now defunct Industrial Court in terms of section 46 (9) of the old Labour Relations Act, No.28 of 1956 (“the old Act.”). As the alleged unfair labour practice arose prior to November, 1996, the dispute must, in terms

of item 21 of schedule 7 of the current Labour Relations Act, No 66 of 1995 ("the LRA"), be determined as if the old Act had not been repealed. Since the abolition of the industrial court, unfair labour practice disputes that arose before the new Act are dealt with by commissioners of the Commission for Conciliation, Mediation and Arbitration ("the CCMA") exercising the same powers that the Industrial Court had. A commissioner of the Commission for Conciliation Mediation and Arbitration ("the CCMA") gave a judgment on 2nd September, 2002. The final paragraph of that judgment reads as follows:

"For the reasons stated above I am of the view that the applicant's dismissal with effect from 31st May 1994 constituted an unfair labour practice. No other finding or order is made in terms of the parties' agreement that I, at this stage, only make a finding as to the merits of the dispute. All other possible orders are reserved for decision once the parties, or any one of them approach the CCMA to this effect."

The appellants appeal against that judgment and order.

[2] The employee had held the position of contracts manager in the second appellant at the time that the business of the second appellant had been amalgamated with several other businesses, resulting in a restructuring and certain retrenchments within the second appellant and the other businesses. The second appellant and the other businesses were amalgamated in the third appellant. The third appellant is a wholly owned subsidiary of the first appellant. The new business that was created was that of the third appellant. The restructuring exercise, although it had been

conceived in 1993 and the initial consultation processes had begun then, was only finalized in 1994.

[3] The employee was offered the position of business manager, mining, in the third appellant on the same terms and conditions as applied in his position with the second appellant. This took place on 2nd February, 1994. The employee discussed aspects pertaining to the new position with the director to whom he would be required to report in the new structure, Mr Szerdahelyi. This took place on 3rd February, 1994. The employee had previously reported to Mr Eales, the managing director of the second appellant. He became a director in the third appellant and reported also to Mr Szerdahelyi.

[4] The employee addressed a memorandum to Mr Szerdahelyi on 17th February, 1994 in which he indicated that he would accept the position subject to certain conditions. Among them were that he be transferred to Rivonia and be paid a tax-free relocation allowance, that he be compensated for any losses incurred in selling his existing house and buying a new one, a housing subsidy and collateral security? for the new house, payment of his transfer and legal fees, a tax-free travel allowance, and that his car allowance and benefits be increased. Mr Szerdahelyi replied in writing on 21st February advising that the employee's expectations "are beyond what is possible now and for the foreseeable future. We would appreciate a

discussion, at your earliest convenience, to review possible alternative positions within the group.”

[5] It would appear that meetings took place between the employee and Mr Szerdahelyi between 17th and 21st February, 1994. Nothing turns on this other than the fact that such meetings did take place indicates that the employer was prepared to consider the matter. The two men met on 7th March, 1994 to discuss the matter further. No resolution was reached and a letter was then sent to the employee on 10th March, 1994 advising that the employee’s services would be terminated with effect from 31st May, 1994 by reason of his redundancy. The employee’s attorneys addressed a letter to the “Steinmuller Groep van Maatskappye” on 24th August, 1994 in which the fairness of the employee’s dismissal was disputed. This was the issue before the Industrial Court which was dealt by the commissioner of the CCMA.

[6] The commissioner found that the appellants “never entered into a meaningful consultation with the applicant in order, first of all, to discuss and motivate the third respondent’s reasons for not being in a position to accede to any of the conditions laid down by the applicant, and secondly, to make a serious and bona fide endeavour to reach consensus with the applicant on the

terms and conditions under which he should, or be prepared, to accept the job offer made to him, and, failing that, put the applicant in a position either to accept the third respondent's job offer on terms and conditions spelled out by it, or to accept the alternative of being dismissed for operational reasons." He went on to say in his judgment:

"I am of the view that the third respondent acted unfairly in not, first of all, making a reasonable effort to convince the applicant to accept the job offer on its face value as a means for avoiding his dismissal by engaging in bona fide and meaningful discussions regarding his expectations to the extent of at least trying to convince him that his expectations were unreasonable, and, secondly, to put him in a position to either accept the job offer unequivocally or run the risk that the job offer would be withdrawn."

[7] In my opinion, there were meaningful consultations, on several occasions, both after the employee was made the offer and after he rejected it and made counter-proposals. I do not see what more could reasonably have been expected of the appellants. Neither in law nor in fairness, is there is any obligation that rests upon an employer who offers an employee alternative employment in order to avoid retrenchment to make an effort to **convince** the employee to accept the alternative offer. This is the position both under the old Act and the LRA. In the circumstances of the present case, the notion is ridiculous. The Industrial Court was plainly wrong in making such a finding. On the facts before us, there was no unfair labour practice committed by the appellants relating to the dismissal of the employee. Accordingly the appeal must be upheld.

[8] As to costs, in terms of section 17(12)(a) of the old Act the

Industrial Court could make a costs order “according to the requirements of law and fairness” and section 17 (21A) (c) provided similarly for the Labour Appeal Court. See also **National Union of Mineworkers v East Rand Gold & Uranium Co Ltd** (1991) 12 ILJ 1221 (A) at 1241J-1243E and **Callguard Security Services (Pty) Ltd v Transport & General Workers Union & Others** (1197) 18 ILJ 380 (LC) at 389 H to 390A. It seems appropriate that, in this case, costs should follow the result both in the Industrial Court and this Court.

[9] The following order is made:

- i) The appeal is upheld;
- ii) The order of the Industrial Court is set aside and the following substituted therefor:
“The application is dismissed with costs.”
- iii) The respondent is to pay the appellants’ costs in the appeal.

N.P. WILLIS

JUDGE OF APPEAL

I agree.

R. M. M. ZONDO
JUDGE PRESIDENT

I agree.

C. N. JAFTA
ACTING JUDGE OF APPEAL

Counsel for Appellant: *W.G. La Grange*

Attorneys for Appellant: Bell Dewar & Hall

Counsel for Respondent: *P.G. Leeuwner*

Attorneys for Appellant: Retief Venter

Date of hearing: 4th June, 2004

Date of Judgment: 9 July, 2004