

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Case No: JA47/2004

In the matter between:

SHELCO SHELVING (PTY) LTD

Appellant

and

NATIONAL UNION OF METALWORKERS

OF SA

DAVID MAZIBUKO

RAYMOND STHEBA

DODO MPHAHLELE

DOMINIC NXUMALO

SAMSON TANADZANA

1st Respondent

2nd Respondent

3rd Respondent

4th Respondent

5th Respondent

6th Respondent

JUDGEMENT

H.M. MUSI, AJA

INTRODUCTION

[1] This is an appeal against a judgment of the Labour Court delivered on 13 May 2004 in terms of which Tlaletsi AJ found that the dismissal of the 2nd to the 6th respondents (“**the individual respondents**”) by the appellant for operational requirements on the 26th April 2001 was substantively and procedurally unfair and ordered the appellant to pay them compensation equal to the salary that each one of them would have earned for a period of 6 months from the date of dismissal.

He also ordered the appellant to pay the costs of suit. The appeal is with the leave of this Court upon petition after Tlaletsi AJ had refused leave to appeal.

CONDONATION

[2] The record of the appeal was delivered to the Registrar out of time and the appellant accordingly brought an application for the condonation of the late delivery of such record. The application was not opposed and we considered that a reasonable explanation had been given for the default and accordingly granted condonation. However, there is an aspect that caused us concern in this application. The affidavit filed in support thereof was signed by Mr Snyman, the appellant's attorney, but was not attested to by a commissioner of oaths. At the hearing in the Labour Court Mr Snyman, handed in a fresh affidavit, which was on the face thereof properly attested to.

[3] We sought clarification from Mr Snyman on the discrepancy in the earlier affidavit. His explanation was that he had gone to an attorney with the unsigned affidavit, had told the attorney that the contents thereof were within his knowledge and were true and correct. He said that he had then signed the affidavit and given it

to the attorney to attest to it later. Mr Snyman said that he had later collected the affidavit from the attorney without noticing that the attorney had not attested to it. Mr Snyman said that this was normal practice amongst attorneys who know each other. I have no knowledge of whether Mr Snyman's statement that this is normal practice between attorneys who know each other is correct. The law is very clear that the person who seeks to depose to an affidavit is required, among others, to be before a commissioner of oaths and must swear that the content of the document or statement are within his personal knowledge and that they are, to the best of his knowledge and belief, true and correct. Mr Snyman acted irregularly in this matter in regard to the first purported affidavit because his explanation does not say that he took the required oath. It is unacceptable to sign an affidavit as a deponent without taking the oath or an affirmation.

THE ISSUES

- [4] The issues in respect of which leave to appeal was granted in this matter were very limited. They were whether the individual respondents were offered alternative employment which they rejected and, if so, what the effect thereof is on the order that was

granted by the Labour Court. This appeal is confined to these issues.

The facts

[5] The appellant is a private company which has its principal place of business in Cape Town. It has a branch in Tulisa Park, Johannesburg. Its core business is the manufacture and supply of steel shelving systems. The individual respondents were employed in the appellant's Johannesburg branch. This branch comprised two sections: a stores/warehouse section and a section called "contracting" section. The stores/warehouse section is where products were kept and from where they were sold and distributed. The "**contracting**" section did stores design, joinery and installation of the steel shelving systems. This section specialised in the actual fitting and installation of the shelving systems designed according to the individual orders of each customer. The Johannesburg branch seems to have employed a total of about 35 employees in the two sections.

[6] During March 2001 the appellant made known its intention to restructure its business by closing down the contracting section. It sought the assistance of an organisation called the National

Employers Forum (“**the NEF**”), a registered employers’ organisation of which it was a member. The NEF initiated a process of consultation with the individual respondents and their union, the first respondent, by way of a notice in terms of section 189(3) of the Labour Relations Act no. 66 of 1995 (“**the Act**”).

- [7] At the first meeting between the parties held on 5 April 2001 the appellant gave its reasons for wanting to close down the contracting section. The reasons it gave were that some of its customers who had been buying its shelving systems had also become actively engaged in the joinery and installation work. This meant that, in so doing, such customers were thus competing with the appellant. This was considered undesirable and hence the need to close down the contracting section. The management said that the company wanted to focus on manufacturing. The closure of the contracting section would obviously make some of the workers redundant. The appellant raised two alternative proposals to retrenchment. In the minutes of that meeting the alternative proposals are reflected thus:

“At this moment in time, the company have the following alternatives:

i) to secure a number of jobs in the manufacturing division.

“ii) The possibility exists that an independent company might start a fitting company. The Company can see whether they can secure a number of position[s] at the new company.”

[8] The company indicated that the number of employees who were likely to be retrenched or who were going to be retrenched was +- 13. It also said another +- 13 employees would be offered possible alternative employment while another +- eight employees would continue in the appellant's employment. The company proposed to use skills and qualifications as selection criteria. The next consultation meeting took place on 18 April 2001. At this meeting the union made some proposals which, in the light of the crisp issue before us, I need not go into. The suggestion that a new company would be formed to take over the work of the contracting section and that it might offer alternative employment was again raised and discussed. The union also asked for some information about the new entity or company. Subsequent to this meeting the union placed on record by way of a letter dated 20 April 2001 the

proposals it had made to the company at the meeting of the 18th April. It is not necessary to refer to those proposals.

- [9] On the 20th April 2001 the company addressed a letter to the union paragraph three (3) of which read thus: **“The company wishes to advise that it is in the process of negotiating possible alternative employment for a number of employees with a party interested in opening a new contracting business. Shelco Shelving will have no investment, shareholding or business interest in this venture whatsoever.”** The appellant said that it would sublease to the new entity a portion of its Johannesburg branch. The appellant also said that the new entity would require about 14 workers. The letter specifically cautioned that selection of staff for employment in the new business would be solely at the discretion of the owners of the new business and that **“contract work may be offered to the retrenched employees subject to skills requirement and workload”**.

- [10] The final meeting was held on 25 October 2001. The issue of alternative employment by the new entity was again discussed but nothing came of it. Other issues were also discussed including severance pay and other alternatives but the meeting

reached a deadlock. The dismissal of the individual respondents followed on 26 April 2001.

[11] It is common cause that the appellant did not itself offer the individual respondents or any of the employees alternative employment. However, it is clear from the appellant's letter of 20 April 2001 to the union that the appellant confirmed that it was negotiating with the owners of the new entity to ensure that the new entity offered alternative employment to as many of the workers to be retrenched as it needed.

[12] In his evidence - in - chief Mr Harvey testified that the appellant had selected for retention the employees who had been working in the stores. He said that their selection was primarily because of their knowledge and skills in that department and that the rest would have to be retrenched. Under cross-examination he made it clear that Storeworks CC could only be established after the closing down of the contracting section and the dismissal of the affected employees. He also testified that the individual respondents were without jobs because they refused to accept the offers of alternative employment made to them by or on behalf of Storeworks CC. He testified that had they accepted alternative

employment, the individual respondents would not have been without employment.

**WAS ALTERNATIVE EMPLOYMENT OFFERED BY
STOREWORKS CC OR MR HARVEY ON BEHALF OF
STOREWORKSCC?**

- [13] The cardinal question therefore remains whether Harvey or Storeworks CC did offer the individual respondents alternative employment. An interesting development is the production at the trial of a letter addressed by Storeworks CC to Ketumile C. Mogase & Associates, a firm that at some stage represented the first respondent in the negotiations with the appellant. The letter advised that employment offers had been made to the addressee's clients with effect from the 1st of May 2001 and that, since the offers had been rejected, Storeworks CC would make alternative arrangements to fill the positions. The respondents denied having instructed such firm and disputed the contents of this letter. No direct evidence was led about the authenticity of this document or the circumstances under which it was written. The letter also did not list any of the individual respondents as being amongst the clients of the firm concerned. This notwithstanding, it was never put to Harvey that such letter was a fabrication.

[14] There was a dispute whether a particular group of employees had been targeted for retrenchment and if so, which ones and which group would be offered alternative employment. In the meeting of 5 April 2001 it was recorded that a total of 34 employees were involved. Of these 13 would be retrenched, 13 would be offered alternative employment in the new entity and eight (8) would be retained by the appellant. The eight employees who were to be retained worked in the stores section which was not affected by the restructuring and they were not retrenched. However the 2nd respondent, David Mazibuko, who was a driver in the stores section was not retained and was retrenched. Evidence at the trial established that the reasons for his retrenchment were not fair. In this appeal it has been conceded that he was not offered alternative employment and that, indeed, his retrenchment was unfair. He will feature in this judgment only insofar as he was part of the 26 employees that were involved in the retrenchment process.

[15] The individual respondents stated that they were in the group that was targeted for retrenchment from day one and that is why they were not offered alternative employment. They also alleged that

there was a list identifying those targeted for retrenchment, though they were unable to produce one. According to this version of the affected employees, 13 were earmarked for alternative employment and another 13 for outright retrenchment. Harvey, on the other hand, denied that any list was drawn either of the people that were earmarked for retrenchment or those to be offered employment. According to him a process would have been put in place for the selection of staff that Storeworks CC required, based on skills and experience and that they would be retained on the same terms and conditions of employment that governed their employment by the appellant. Indeed, he said that their length of service with the appellant would be recognised by Storeworks CC. He had estimated that they would require about 13. Those that could not be accommodated in Storeworks CC would have had to be retrenched.

[16] In oral argument Mr. Snyman, for the appellant, alleged that selection was confined to 13 employees who included the individual respondents. He said that this is because these were the only people who worked in the contracting department and who had the experience and skills that Storeworks CC required. He submitted that the offers of employment could only have been

made to this group and that the inference should be drawn that they knew of the offers and rejected them.

- [17] In response the attorney for the respondents submitted that there were in fact 26 employees in the contracting department. She referred to the organogram appearing at page 86 of the record which shows a total staff compliment of 35, of which 8 worked in the stores and one was a tea lady, leaving a balance of 26 for the contracting department. She pointed out that in fact 26 had to be retrenched with the closing down of the contracting department, precisely because that was its full compliment. This may have been so but Mr Harvey was adamant both in his evidence in chief and under cross-examination that offers of alternative employment had been made to, among others, the individual respondents in this case (except Mr Mazibuko) and he was not shaken in his evidence. No reason was ever suggested why Mr Harvey would have said that offers of employment were made to these individual respondents when that was not so. He knew the employees well as they worked together. It was never suggested to him under cross-examination that he could be mistaken about the identity of the employees to whom offers of alternative employment had been made by him or on behalf of Storeworks CC.

- [18] As I said earlier in this judgment, the sole question in respect of which this Court granted the appellant leave to appeal was whether or not the individual respondents were offered alternative employment which they rejected and, if so, what the effect thereof would be on the order that was granted by the Labour Court.
- [19] On behalf of the appellants it was argued that Storeworks CC had offered the individual respondents alternative employment but they rejected it. Mr Harvey was very emphatic that this was the position. The two witnesses who testified on behalf of the respondents denied that Storeworks CC had offered them or the individual respondents alternative employment but one, namely, Mr Dodo Mphahlele, testified that Mr Harvey took his telephone number and promised to telephone him but never telephoned him. However, this part of his evidence cannot be used against Mr Harvey because it was never put to him during his cross-examination.
- [20] In seeking to substantiate his denial that Mr Harvey or Storeworks CC had offered the individual respondents alternative employment, Mr Mazibuko, one of the individual respondents, sought to explain that there were two groups of 13 workers each. He said that the one group was that of workers who got retrenched and the other one was that of the workers who went to work for Storeworks CC. He further stated that he and the individual respondents belonged to the group that was retrenched and not the group that was retained and moved to Storeworks CC.

- [21] Mr Mazibuko's evidence seems to be in line with the argument that the attorney for the respondents advanced, namely, that the individual respondents fell into a group that was not offered alternative employment. As I understand it, this point is directed at saying that Mr Harvey was mistaken as to which group of employees was offered alternative employment if any one was offered. The difficulty with this version is that it was never put to Harvey that he was mistaken as to which group was offered alternative employment. However, even if it was put – may be not as clearly as it should have been put – Mr Harvey's version seems more probable and he was very emphatic that offers were made to these individual respondents. On the whole he also presented his evidence in a very clear manner.
- [22] If one leaves out Messrs Mazibuko's and Mphahlele's evidence referred to above, one is left with Mr Harvey's evidence that the individual respondents (except for Mr Mazibuko) were offered alternative employment by Storeworks CC but they rejected such offer and what amounts to almost a bare denial by the individual respondents that they were offered such alternative employment.
- [23] It does not appear to me that it is difficult to resolve this conflict in the versions of the two parties because there are certain common cause facts which will facilitate the resolution of this conflict. The first is that during the consultation meetings between the appellant's management, which included Mr Harvey, and the representatives of the workers the appellant's management did say that there was a new company or entity to be established which would take over the work previously done by the contracting

department. The second is that Mr Harvey or the appellant's management also said that that entity would offer about 13 employees from the contracting department alternative employment.

[24] The third is that the employees from the contracting department whom Storeworks CC wanted would have had the skills and experience that Storeworks CC as a newly formed entity would need in doing the work previously done by the contracting department. In terms of par 2.26 of the pre-trial minute it is common cause between the parties that **“[the appellant] negotiated employment for several employees with Storeworks CC.”**

[25] At the meeting of the 25th April 2001 Mr Harvey is reflected as having explained **“all the required information relating to the new company.”** In those minutes it is also recorded that **“(t)he parties spend (sic) some time discussing the new company and the conditions of employment for the staff who will be taken on by the new company.”** In its letter of 20 April 2001 to the first respondent, the appellant, through Mr Harvey, said in par 3 that it **“wishes to advise that it is in the process of negotiating possible alternative employment for a number of employees with a party interested in opening a new contracting business.”** There was even a letter which Storeworks CC wrote to a firm of attorneys or consultants where they placed on record that they had made offers of alternative employment to that firm's clients but those clients had rejected such offer and it, that is Storeworks CC, would then have to look for other people to offer them such employment.

[26] I am of the view that all of these common cause facts show that, on a balance of probabilities, the individual respondents herein, except Mr Mazibuko, were offered alternative employment at the suggestion of the appellant and they rejected it. Storeworks CC or Mr Harvey had promised to employ some of the employees from the contracting department who had the necessary skills and experience. Why would Mr Harvey have changed his mind when he and the union had spent a lot of time dealing with the union's questions about the new entity? Why would Storeworks CC have elected to offer employment to employees who had no skills or experience which it required when there were workers previously employed in the contracting department who had the skills and experience that Storeworks CC was in great need of if, indeed, such workers were available and willing to continue doing such work as they had done in the contracting department?

[27] In all of the above circumstances I am satisfied that the Court a quo erred in finding that no offer was made to the individual respondents. The probabilities are overwhelming that they were offered alternative employment at Storeworks CC but rejected it. As it is common cause that the appellant negotiated with Storeworks CC or its future owners to offer alternative employment to some of its employees who were facing possible retrenchment, I am of the view that the dismissal was not substantively unfair. The offer of alternative employment and its rejection by the individual respondents particularly when employment was going to be on the same terms and conditions of employment as those which had governed their employment while

in the appellant's employ and the fact that they were going to retain their service periods, rendered the dismissal substantively fair.

[28] The Court a quo also found that the dismissal was procedurally unfair. No leave to appeal was granted against this part of the order of the Court a quo. That finding or order must therefore remain. However, I am of the view that the effect of the finding made above with regard to the offer of alternative employment is that, had the individual respondents accepted Storeworks CC's offer of alternative employment, they would not have suffered any loss of income. Accordingly, they should not be awarded any compensation. With regard to costs I am of the view that no order as to costs should be made in this case. I think that in the Court a quo as well as in this Court, there should be no order as to costs. That seems to me to accord with the requirements of law and fairness.

[29] In the result I make the following order:

1. The appellant's appeal against the orders of the Labour Court in so far as such orders related to individual appellant Mr Mazibuko is hereby dismissed.
2. The appellant's appeal against orders of the Labour Court appealed against concerning the rest of the respondents is hereby upheld.
3. There is to be no order as to costs on appeal.
4. The order of the Labour Court is hereby replaced with the following order:

- “(a) The dismissal of applicant Mr Mazibuko was substantively and procedurally unfair.**
- (b) The dismissal of the rest of the individual applicants was procedurally unfair but substantively fair.**
- (c) The respondent is ordered to pay Applicant Mr Mazibuko an amount of compensation equal to the remuneration that he would have earned over a period of six (6) months calculated at the rate of pay applicable to him at the time of his dismissal.**
- (d) The payment referred to in (c) above must be effected within fourteen (14) days from the date of the service of the order.**
- (e) No order for the payment compensation is made in respect of the individual applicants other than Mr Mazibuko.**
- (f) Leave is hereby granted to applicant Mr Mazibuko and the respondent to approach the Court for the computation of the amount payable to applicant Mr Mazibuko should there be a dispute on the amount and the parties fail to resolve it.**
- (g) There is to be no order as to costs.”**

HM Musi AJA

I agree.

Zondo JP

I agree.

Jappie AJA

Appearance:

For the appellant : Mr S. Snyman

Instructed by : Snyman Attorneys

For the respondent : Ms R. Edmunds

Instructed by : Ruth Edmonds Attorneys

Date of judgment : 20 March 2007