



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no : CA20/2012

In the matter between:

WORLD OF WINDOWS (PTY) LTD

Appellant

and

JERRY FATTINE SUMBANE

Respondent

Heard: 27 August 2013

Delivered: 31 January 2014

Summary: Dimissal for operational requirements – employer must select employee for retrenchment according to agreed criteria or criteria which are fair and objective- employee dismissed before alternatives to dismissal exhausted - dismissal premature and substantially unfair. Appeal dismissed.

CORAM: WAGLAY JP, C J MUSI AJA et DLODLO AJA

JUDGMENT

C J MUSI AJA

- [1] This is an appeal against the judgment of the Labour Court (Rabkin-Naicker J) wherein it found that the respondent's dismissal was unfair and consequently ordered his reinstatement. The appeal is with the leave of the court *a quo*.
- [2] The respondent was employed by the appellant on 6 January 1998 as a glass cutter. Due to his ill-health, he was moved to the store-room. During 2008-2009, the appellant had to dismiss some of its employees based on its

operational requirements. The respondent was selected as a candidate for such dismissal. Consultations were held but they did not yield a positive result and the respondent was consequently dismissed on 9 March 2009. He challenged his dismissal in the court *a quo*.

- [3] The facts of this matter can be summarised as follows. The respondent was employed in Johannesburg, during 1997, by the appellant. It is not clear whether such employment was on a permanent basis or not. Nevertheless, on 6 January 1998, he was employed by the appellant at its Cape Town business. He moved from Johannesburg to Cape Town for that purpose. He worked as a glass cutter and became the most senior glass cutter at the appellant.
- [4] During 2007, he got ill and Mr Van der Merwe, the glass and export manager of the appellant placed him on light duty after being so advised by the respondent's doctor. He initially worked in other departments but was ultimately moved to the storeroom to assist the two storeroom assistants.
- [5] Although he worked in the storeroom, his salary grade remained the same as when he was in the glass cutting department (grade D), which was different from the storeroom assistants' grade. When his health condition improved, he requested Van der Merwe to allow him to return to the glass cutting department but Van der Merwe told him that the company was still busy with his case. Van der Merwe could not recall whether the request was made or not.
- [6] The appellant not being immune to the global economic meltdown felt its effects to such an extent that it could not survive, financially. Its poor economic circumstances, occasioned by the global recession, necessitated the decision to dismiss some of its employees based on its operational requirements.
- [7] On 29 November 2008, Alan Reed, the Group Chief Executive Officer (the CEO), sent a memorandum to all directors and staff informing them about the possibility of retrenchments. He set out the reasons for the possible retrenchments and the matters on which the appellant had to consult with its

employees. He stated that “retrenchments would take place on the LIFO basis in each department, having regard for skills and position held, as well as disciplinary record”. Staff representatives were invited to attend a meeting on 4 December 2008 to discuss the impending retrenchments.

- [8] At the meeting of 4 December 2008 – which was not attended by any staff representative of the appellant, the purported selection criteria were stated as follows:

“Criteria shall include the following: Last in first out per department, skills retention, and disciplinary record.” (my underlining).

This meeting was held despite the National Union of Metalworkers of South Africa’s (NUMSA) objection to the notice because it, as a representative of some of the employees, was not notified. NUMSA indicated that it will be available on 8 December 2008, for consultation.

- [9] On 23 January 2009, the CEO issued a further retrenchment notice and invited the affected employees to a consultative meeting on 28 January 2009. This notice contained the same selection criteria as the letter dated 29 November 2008.
- [10] On 28 January 2009, the respondent, as an employee earmarked for retrenchment and NUMSA officials attended the meeting. Mr Maphupha, the Human Resource Director of the appellant, kept the minutes of the meeting. After the CEO explained the rationale behind the proposed retrenchments and the time line thereof, the following is minuted “Criteria = LIFO skills”. The respondent asked the following questions:

“1. Which procedure the company used to get the names of the first group?”

2. Why can’t the company work normal time first before retrenching people?”

3. I was employed as a glass cutter. “When I was ill and was moved to the storeroom. But why am I being retrenched.” (Quoted without emendation.)

His questions went unanswered. The meeting was adjourned until 4 February 2009.

- [11] The respondent did not attend the meeting of 4 February 2009. Mr Mario Bratz represented the non-unionised employees, which included the respondent. NUMSA indicated that it would like to talk about the criteria and the way forward at the next meeting which was scheduled for 11 February 2009.
- [12] The meeting did not take place on 11 February 2009 but it was held on 18 February 2009. During this meeting, NUMSA suggested that the appellant consider “LIFO in the company with regard to skills, bumping and voluntary severance packages”. The appellant responded that employees were already requested to ask for voluntary retrenchments and that it cannot have people who are partially skilled for the job, hence the criteria must be per department.
- [13] On 24 February 2009, Mr Maphupha sent a list of all the employees who were earmarked for retrenchment including five who were still subject to discussion because of “changing departments”. The respondent was one of the five.
- [14] On 25 February 2009, another meeting was convened. Although the minutes reflect that the respondent was not present, it is clear therefrom that he was present. According to the minute, the respondent indicated that he will be going for an operation on the following day. The reason for his proposed retrenchment was explained to him and he indicated that he will give an answer on the subsequent Monday. During this meeting Bratz accepted that he (Bratz) may be retrenched.
- [15] On 2 March 2009, Maphupha held a meeting with the respondent. He was asked whether he accepted the suggested criteria of last in first out per department and he answered affirmatively when he was asked whether he agrees that he works in the storeroom he vehemently denied it and insisted that he works in the glass cutting department. He informed Maphupha that the move to the storeroom was temporarily pending the improvement of his health. Maphupha asked him whether he was prepared to re-negotiate his pay-rate if some light duty position can be found for him. His response was

that he was used to the wage that he earned and would like to retain it, and that he does not feel like carrying heavy glass but if it is the only way to keep his rate then he was prepared to die carrying heavy glass. Maphupha reiterated the appellant's position and informed the respondent that the appellant had nothing suitable for him and that he will therefore be retrenched. The minutes of this meeting, unlike the others, were typed but unsigned. According to Maphupha, the original which was taken long-hand is irretrievably lost.

- [16] Strangely, on the same day, 2 March 2009, Maphupha gave the respondent a letter to give to his (respondent's) doctor. The letter reads as follows:

"THE ATTENDING DOCTOR

Dear Sir

RE: MR JERRY SUMBANE

We would like to know whether Mr Jerry Sumbane can be allowed to carry heavy glass ± 165kgs at a time from 7am to 17pm daily as this is part of his job.

His trade is glass cutting and he has shown that he would like to continue cutting glass as per his job responsibilities since his employment date with the company.

Please no confidential information required."

- [17] By letter dated 3 March 2009, Dr Abrahams responded as follows:

"RE: Jerry Sumbane

The above-mentioned pt will be referred to our occupational thearapist (sic) for formal work-place evaluation.

I will inform you of the outcome as soon as possible.

Please explain if employees are expected to carry glass of ± 165kgs without any mechanical assistance as I can imagine that most employees would not be able to carry that load without developing lower back problems."

On 9 March 2009, the respondent was dismissed with effect from 10 March 2009.

- [18] Mr Maphupha testified that agreement was reached on the selection criteria at the meeting of 18 February 2009. He also testified that bumping, as suggested by NUMSA, was considered but rejected because it is difficult to implement. According to him, the respondent told him that he is not strong enough to go back to the cutting department hence he requested the respondent to procure a medical certificate to the effect that he is fit and able to resume duty in the glass cutting department. He denied that the note by Dr Abrahams was given to him by the respondent.
- [19] The respondent on the other hand testified that he did not agree to his retrenchment and that he was dissatisfied that he was earmarked for retrenchment while he was a very experienced glass cutter and he had taught all the glass cutters, at the appellant, how to do the work. He insisted that his move to the storeroom was temporary. He was adamant that he gave the doctor's letter to Maphupha.
- [20] The Labour Court was of the view that it was unnecessary to make a finding on the issue of the substantive fairness of the selection criteria in the process as a whole. The learned judge concluded that this is a case where the failure to exhaust the alternatives to the retrenchment of the respondent is an example of a substantively unfair result. The court *a quo* found that the aspect of whether the doctor's letter was seen by the appellant before retrenching the respondent was a critical one. The learned judge made an adverse credibility finding against Maphupha and found that the letter was delivered to him by the respondent. In the judgment of the court *a quo*, the retrenchment of the respondent was decided upon in spite of the possibility existing that a formal workplace evaluation by an occupational therapist may have found him fit for work in the glass cutting department. Therefore, so reasoned the court *a quo*, the appellant's failure to exhaust alternatives to retrenchment impacted on the substantive fairness of the respondent's dismissal.

- [21] Although heads of argument were filed on behalf of the respondent, there was no appearance on his behalf before us.
- [22] Mr Leslie, on behalf of the appellant, argued that any consideration of an alternative in the glass cutting department for the respondent would have necessitated the dismissal of another employee. According to him the essence of the court *a quo*'s judgment is that the appellant should have considered bumping in order to save the respondent's job. He submitted that bumping was considered and rejected during the consultation process leading to the retrenchments. That being the case the appellant could not make an exception because it had a duty to act fairly towards all employees. To make an exception would have been unfair and iniquitous to the other employees earmarked for retrenchment not least the person selected to be "bumped".
- [23] In terms of section 189(7)(a) and (b) of the Labour Relations Act, No 66 of 1995, the employer must select the employees to be dismissed according to selection criteria that have been agreed to by the consulting parties or if no criteria have been agreed upon, criteria that are fair and objective may be used. The employer bears the *onus* to prove that the selection criteria were agreed upon or that it used fair and objective criteria in selecting the employees to be dismissed.
- [24] Although Maphupha testified that agreement was reached on the selection criteria, the appellant's case is at best equivocal on this issue. Maphupha's evidence is that agreement was reached on the selection criteria at the meeting held on 18 February 2009. However the minute of the meeting does not contain a record of such agreement. During cross-examination Maphupha was asked about the agreement and the following was recorded:

"So far, what I've heard you say, is you say the company suggested criteria, and the union came back to say LIFO in the company with regard to skills and bumping. I'am asking you, where is it recorded that there was this agreement? --- Okay. Well it was not recorded that there's a disagreement, because there it was just points of discussions. It was not a record of what was agreed or disagreed ... The purpose of the note is to keep a record of the

discussion, and you write down everything ... (intervention) ... And the points of discussions, yes ...

Yes. Now where is this important point of the agreement on the selection criteria, which is your company's case? --- Oh-okay, on this meeting, then – on the 18th, then, yes, it was not settled.

It wasn't settled? --- We didn't discuss it further, ja."

- [25] Maphupha's evidence contradicted the appellant's (then respondent) statement of defence. In the said statement, it stated that:

"It was specifically agreed at the meeting of 11 February 2009, that staff would be selected on the basis of LIFO per skills subdivision, on other words, last in first out within a particular department."

- [26] It was common cause that no meeting was held on 11 February 2009 and the date ought to be 18 February 2009. On Maphupha's evidence no such agreement was reached.
- [27] It is also clear that the selection criteria as suggested by the appellant were not consistent. It vacillated from it would include LIFO per department to being "LIFO - skills" and ultimately to LIFO in each department having regard to skills and position held and disciplinary record.
- [28] It is probably the confusion created by the variable selection criteria that lead to the further discussions with the respondent in order to find an alternative position for him. In keeping with the appellant's duty not to dismiss the respondent for operational reasons when it has work which he can perform, the appellant engaged the respondent with a view to finding him an alternative position.
- [29] Maphupha admitted during cross-examination that he wanted to avoid the respondent's dismissal and the only obstacle in the way of accommodating him in the glass cutting department was to ascertain whether he could physically do the work. If he could then he would be returned to the glass cutting department. It is for that reason that he was referred to the doctor. Although Maphupha's letter contained misleading information, it is not

necessary to determine whether he deliberately made those misrepresentations. I however agree with the trial court that Maphupha's evidence, in relation to him not having received the doctor's note, is improbable and leaves a dent on his credibility. He must have received the note. The respondent's evidence is clear that he gave the doctor's note to Maphupha. The appellant admitted in the pleadings that the doctor's note was received and evaluated. The only plausible reason why he was asked to get confirmation from a medical practitioner relating to his health was to see whether he can be placed back into the glass cutting department. The appellant's (as respondent) plea in relation to this issue is very significant. It deserves reproduction. It reads as follows:

"6.1 This is admitted. Respondent's Prince Maphupha met with applicant on 2 March 2009, to discuss his suggestion that he be transferred back to the glass cutting department, the net effect of which would have been that he would not, on the basis of the agreed selection criteria be retrenched.

6.2 To consider of (sic) applicant's suggestion, Maphupha recommended that applicant procured a medical report. Although the report did not however provide sufficient information, applicant himself conceded that he could not fulfil the functions of a glass cutter, which involves carrying and lifting heavy glass.

6.3 For these reasons, respondent rejected applicant's request to be transferred back to the glass cutting department."

- [30] The case as pleaded makes it clear that the medical report was to be procured in order to consider the respondent's suggestion to be placed back in the cutting glass department in order to avoid his dismissal. Mr Maphupha's version that the process was over when he requested the respondent to procure a medical report is at variance with the appellant's pleaded case and the probabilities. The pleaded case also does not tally with the minute kept by Maphupha. The respondent never conceded that he could not fulfil the functions of a glass cutter. He said he does not like carrying heavy glass but if it is the only way to retain his rate then he was prepared to do it. The net effect of the appellant's pleaded case was that it would have placed the

respondent back in the glass cutting section if he was fit enough. It is not necessary to decide whether this could only have been achieved by bumping another employee or not.

[31] It is clear that the respondent's employment was terminated while the parties were still exploring alternatives to his retrenchment. The only obstacle in the way of him being placed in the glass cutting department was his physical fitness. He was adamant that he was fit enough to do the work. The evaluation by an occupational therapist was not yet done. Therefore the exploration of alternatives to the dismissal was still incomplete, making the dismissal premature and substantially unfair.

[32] In my view, there is no reason to interfere with the Labour Court's judgment.

[33] I accordingly make the following order:

- (a) The appeal is dismissed.
- (b) No order as to costs is made.

C. J. Musi AJA

I concur.

Waglay JP

I concur.

Dlodlo AJA

APPEARANCES

FOR THE APPELLANT:

Adv Leslie assisted by

Adv Townsend

Instructed by Smith Tabata Buchanam Boyes
Cape Town

FOR THE RESPONDENT:

No appearance