

**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD IN CAPE TOWN)**

CASE NO: C727/2010

In the matter between:

SAKHIWO METSHE

Applicant

and

PUBLIC AND ALLIED WORKERS UNION

Respondent

JUDGMENT

LALLIE AJ:

Introduction

[1] The applicant was employed by the respondent as an organiser on 1 April 2008. He was based in East London. After internal strife in the respondent the applicant was suspended on 25 October 2008 pending investigations into allegations of misconduct against him. He was dismissed on 19 November 2008 for operational reasons.

[2] He claims that his dismissal was both substantively and procedurally unfair and seeks reinstatement.

Facts

- [3] Most of the respondent's witnesses are National Office Bearers as they are members of its National Executive Committee (NEC).
- [4] The respondent is based in Cape Town. It has branches throughout the country and is affiliated to COSATU. The gist of the respondent's evidence was that it experienced financial difficulties in February 2008 and decided to attend to the anomaly between its income and expenditure. The NEC took a decision to employ more organisers to recruit more members and generate more revenue. In a management committee meeting of 7 May 2008 it was discovered that the decision did not solve the problem because the respondent was running at a monthly deficit of R255 000.00.
- [5] A further management committee meeting was held where the financial position of the respondent was discussed and means of reducing expenditure including staff reduction were considered.
- [6] When some staff members became aware of the looming retrenchment they took a decision to resist it. Their leader was Mr Charles (Chales). They called an unconstitutional extended NEC meeting in Bloemfontein in August 2008, appointed the applicant as a Provincial Co-ordinator and placed him in Port Elizabeth. They suspended NEC members who did not attend, attempted to open a new bank account using fraudulent signatures and prevented members of the NEC who were purportedly ousted at the Bloemfontein meeting from entering respondent's offices in different towns including Cape Town and Port Elizabeth. The applicant denied the National Secretary, Ms Roseberry

(Roseberry) access to the Port Elizabeth office by changing locks. He even threatened to harm her. He also asked the National Treasury to divert the respondent's funds into a new bank account.

[7] In a notice dated 11 November 2008 the applicant and other employees who were going to be affected by the retrenchment were invited to forward proposals on the issues to be considered at a consultation meeting scheduled for 13 November 2008 in Cape Town. Only 1 person who accepted a reduction in income as an alternative to retrenchment attended. The NEC took a decision that the rest of the staff who had been given notices to participate in the consultation had deliberately and collectively stayed away and resolved to conclude the consultation process. On 19 November 2008 the NEC advised all the affected employees including the applicant in writing that their services had been terminated for operational reasons.

[8] The applicant denied any wrong doing or participating in the ousting of NEC members. He stated that he only acted on the instructions of Charles, his immediate supervisor. He acknowledged receipt of the letter of suspension from Roseberry. He received his letter of dismissal by chance from a fellow employee when he visited the Port Elizabeth office. He denied receiving the notice to attend consultation or to forward his proposals in writing for consideration at the consultation. His version was that upon receipt of his letter of dismissal for operational reasons he challenged his dismissal at the CCMA. His arbitration was heard in the absence of the respondent and he was re-instated. The respondent applied for the rescission of the arbitration award but allowed him to resume his duties until the end of June 2009 while awaiting the outcome of the rescission

application. He was promised that he would retain his job if he did not communicate with Charles and his reports were good. When the rescission award in favour of the respondent was issued on 2 June 2009, he was told to continue working but subsequently received a letter advising him that the 30 June 2009 would be his last day on duty.

- [9] It was the applicant's evidence that his dismissal was unfair because there were no operational reasons that warranted it. It was not preceded by consultation as he received the notice to attend the consultation meeting after he had been dismissed. He further stated that his dismissal was influenced by his suspension. He asked for re-instatement.

Test for fair dismissal for operational reasons

- [10] Section 188 of the LRA requires a dismissal based on the employer's operational requirements to be substantively and procedurally fair. Section 213 of the LRA defines operational requirements as "*requirements based on the economic, technological, structural or similar needs of the employer*". The employer is therefore required to show that the employee's retrenchment was necessary to effect savings. In this regard see *Heigers v UPC Retail Services* [1998] 1 BLLR 45 (LC). In order to pass the test for substantive fairness, the employer needs to prove that the decision to dismiss for operational reasons was genuine and not merely a sham. See *Kotze v Rebel Discount Group (Pty) Ltd* [2000] 21 ILJ 129 (LAC).

- [11] Section 189 (1) of the LRA requires an employer contemplating dismissing one or more employees for reasons based on

operational requirements to engage with a party it has to consult with in a meaningful joint consensus seeking process and attempt to reach consensus on certain aspects affecting the retrenchment. In interpreting the employer's duty to consult the courts have made it clear that the consultation must take place before the employer takes a firm decision to dismiss employees for operational reasons. In *Atlantis Diesel Engines (Pty) Ltd v National Union of SA* (1994) 15 ILJ 1247 the purpose of the employer's duty is clarified as follows:

"Consultation provides employees or their union(s) with a fair opportunity to make meaningful and effective proposals relating to the need for retrenchment or, if such need is accepted, the extent and implication of the retrenchment process. It satisfies principle because it gives effect to the desire of employees who may be affected to be heard, and helps serve the underlying policy of the Act, to avoid or at least minimize industrial conflict."

- [12] Section 189 (2) of the LRA requires the consulting parties to engage in a meaningful joint-consensus seeking process and attempt to reach consensus on a number of aspects affecting the retrenchment. Dealing with the issue of consultation in *SA Chemical Workers Union v Afrox Ltd* (1999) 20 ILJ 1718 (LAC) the Court stated as follows:

"It is implicit in the terms of s 189 (2) that an employer, apart from taking part in the formal consultations on the aspect set out in the section, should also take substantive steps on his or her own initiative to take appropriate measures to avoid the dismissal; to mitigate the adverse effects of the dismissal; to change the timing of the dismissal; to select a fair and objective method for the dismissals and to provide appropriate severance pay for dismissed employees."

- [13] The applicant denied that the respondent had financial problems. He submitted that after the respondent had allegedly noted its financial difficulties it employed more staff members including himself. He further submitted that the respondent did not tender its financials as evidence to prove that there was a need to retrench him. Mr Jood (Jood) who appeared for the respondent attempted to use projections to prove that the respondent was forced by financial difficulties to retrench. He explained that 2 to 3 staff members were employed in March and April 2008 because it was believed that they would recruit more members and generate more income.
- [14] Mr Peters (Peters), the respondent's financial manager conceded that he had no personal knowledge of the respondent's financial position at the time of the recruitment as he had not been re-employed. Mrs Roseberry conceded under cross-examination that they retrenched the individuals they wanted to get rid of. She further conceded that they replaced disciplinary enquiries with retrenchments.
- [15] Roseberry testified that the respondent took the decision to retrench in June 2008. She gave no reasons for the retrenchment exercise not to commence shortly thereafter. Then there was the August 2008 Bloemfontein meeting which divided the respondent and caused mayhem which took a Court Order to stop. On 25 October 2005 the applicant was suspended pending possible disciplining action. In a letter addressed to the applicant dated 11 November 2008 he was informed that at a meeting held in Johannesburg on 7-8 November 2008, the NEC resolved to commence retrenchment consultation urgently. The letter further

advised the applicant that the process must be completed on 17 November 2008 and on 19 November 2008 the applicant received his letter of dismissal for operation reasons.

[16] After the applicant as a member of the group of employees who were going to be affected by the retrenchment committed acts of misconduct, it was up to the respondent to decide steps to be taken against him. The respondent decided to suspend him pending the outcome of the investigation of possible charges against him. That decision created an obligation on the respondent to ensure that the applicant was given a fair opportunity to present a case before the decision to dismiss him was taken. It did not do so it dismissed him for operational reasons instead. The operational reasons being the poor financial position of the respondent. However, Roseberry conceded that the retrenchment was used to rid the respondent of trouble makers.

[17] A dismissal for operational reasons is a no fault dismissal, it cannot be used to justify an employee's unfair dismissal for misconduct. The real reason for the applicant's dismissal, by the respondent's admission, was misconduct. Further no evidence was led to prove that the respondent was in fact experiencing financial difficulties at the time the decision to dismiss the applicant was taken. The applicant's dismissal for operational reasons was therefore a sham and substantively unfair.

[16] I now consider the procedural fairness of the applicant's retrenchment. It was the respondent's version that it sent the applicant a notice dated 11 November 2008 inviting him to a

consultation in terms of Section 189 of the LRA. The applicant denied receiving the notice and the respondent lead no evidence to prove that the notice was served on the applicant. The notice states reasons for the retrenchment and the selection criteria. It has a sub-heading for positions to be abolished and employees to be retrenched. The applicant is listed amongst the employees to face retrenchment. The notice goes further and invites the affected employees to submit proposals by 13 November 2008 on the issues mentioned in the notice in preparation for a consulting meeting.

[17] The Section 189 notice reflects that the applicant will face retrenchment. The notice is therefore inconsistent with the provisions of Section 189 of the LRA. Section 189 of the LRA requires the employer to consult when it contemplates retrenchment. It further requires the consulting parties to engage in meaningful joint consensus- seeking process and attempt to reach consensus on appropriate measures to avoid dismissal, minimise the number of dismissals, change the timing of dismissal, mitigate the adverse effects of the dismissal, the method for selecting employees to be dismissed and severance pay for dismissed employees.

[18] When drafting the section 189 notice, the respondent had already taken the decision that the applicant would face retrenchment. The selection criteria had already been decided. In the notice the respondent effectively communicates its intention to retrench the applicant. There is room for consultation. The haste in which the consultation should have been held also indicates that the respondent was just going through the motions. The respondent's conduct in preparing for the consultation was unacceptable. The

worst part is that it did not deliver the notice to the applicant. In the circumstances the applicant's dismissal was procedurally unfair.

[19] The applicant failed to substantiate his claim that the respondent owed him a relocation allowance in the amount of R15 000.00. It was however common cause that the applicant's monthly income consisted of a basic salary of R8 500.00, housing subsidy of R645.00, car allowance of R1 900.00 and a cellular phone allowance of R325.00.

Relief

[19] The applicant sought re-instatement. Because of the acrimony surrounding the dismissal, I am of the view that a continued employment relationship would be intolerable. Compensation will therefore be the appropriate relief. I award the applicant's compensation equal to 8 months' salary.

Order

- [21]
1. The dismissal of the applicant was substantively and procedurally unfair.
 2. The respondent must pay the applicant compensation equal to 8 months' salary.
 3. No order is made as to costs.

Date of hearing: 4 February, 28 – 29 March 2011

Date of judgment: 23 June 2011

Appearances: For the Applicant
Mr Metshe

For the Respondent: Mr Jood
Of PAWUSA

LABOUR COURT