Date: 30/7/12
Case No: JS 463/10

LABOUR COURTS

REGISTRAR OF THE LABOUR COURT
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Applicant / Representative
Finger Phukubje Inc
....
Fax: 011 333 9409
Ref: Mr Finger/NUM/133/09

Respondent / Representative
D B Contracting North CC
....
Ref:
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Dear Sir/Madam

Re: **NUM vs. D B Contracting North CC**

Please take note that the judgement of the above matter will be handed down on 3rd of August 2012 in Johannesburg Labour Court at 10:00am.

Yours faithfully

SJ GERBER
REGISTRAR

REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: JS 463/10

In the matter between:

NATIONAL UNION OF MINEWORKERS	First Applicant
SIPHO JOSEPH NKABINDE and 105 OTHERS	Second to further Applicants
and	
D B CONTRACTING NORTH CC	Respondent

Heard: 12 and 15 March 2012

Delivered: 03 August 2012

Summary: The respondent, as the employer party, bears the onus to prove that the dismissal of the second to further applicants for operational requirements was substantively and procedurally fair. The respondent cannot dismiss its employees under the guise of operational requirements when the real reason for the dismissal is to use the services of those same employees as employees of labour brokers. Dismissing employees for operational requirements before the time agreed by the consulting parties for the employee party to respond on the employer party's offer of the rate of remuneration renders the dismissal procedurally unfair.

JUDGMENT

LALLIE, J:

Introduction

[1] The respondent dismissed the second to further applicants, whose names are listed in table A, on 4 December 2009 allegedly for operational requirements. The applicants seek an order that the dismissal of the second to further applicants was both substantially and procedurally unfair. They seek reinstatement, alternatively compensation equivalent to remuneration that second to further applicants would have earned over a period of 12 months.

Factual background

[2] A collective agreement binding on both parties was reached at the National Bargaining Council for the Electrical Industry of South Africa (the bargaining council) on 13 March 2009. One of the salient clauses of the collective agreement was that the remuneration of assistant electricians was raised to an hourly rate of R16.98. At the time the collective agreement was concluded, the second to further applicants were remunerated at an hourly rate of R11.55.

[3] The first applicant approached the respondent and demanded that it implement the remuneration clause of the collective agreement. The respondent refused and after holding discussions with the first applicant on the issue the respondent issued the applicant with a notice to attend a consultation in terms of section 189(1) of the Labour Relation Act (the LRA).[1] In paragraph 1 of the notice, the respondent expresses its intention to advise the first applicant of the need to commence retrenchment consultation due its financial problems. This notice was followed by consultation meetings which culminated in the dismissal of the

[1] Act 66 of 1995.

second to further applicants on 4 December 2009. As it is the applicants' case that their dismissal was substantively and procedurally unfair, I will firstly consider the issue of the substantive fairness of the dismissal.

Substantive fairness

[4] Regarding the substantive fairness of the second to further applicants' dismissal, Mr. Magagula (Magagula), the respondent's only witness, testified that because the respondent has no BEE status, it conducts business as sub-contractor for J and J Cable Jointing. The respondent's main business was to dig trenches, lay cables, back filling and cleaning. Magagula explained that when J and J Cable Jointing lost a contract it had with Eskom on 30 November 2008, the respondent ran into financial difficulties. According to Magagula, the respondent's financial position was exacerbated by the first applicant's insistence that the second to further applicants be remunerated at an hourly rate of R16.68, the rate prescribed in the collective agreement. He further testified that the second to further applicants were not even eligible to be remunerated at the hourly rate of R16.68 because they were not electrician assistants, but labourers. The respondent's proposal to grade the jobs of the second to further applicants as labourers and retain their rate of remuneration at R11.55 per hour instead of elevating them to electrician assistants was rejected by the first applicant. The upshot of the refusal was that the respondent could not afford to retain the second to further applicants and it retrenchment them.

[5] Mr. Bengequla (Bengequla), an official of the applicant who represented the second to further applicants during the retrenchment process, denied that the loss of the Eskom contract necessitated the retrenchment of the second to further applicants. He testified that after the loss of the Eskom contract, the respondent secured a contract from Ekurhuleni Municipality. He added that the respondent secured other contracts but chose to use employees of labour brokers. According to Bengequla, the number of labour brokers' employees who got employed by the respondent exceeded the number of retrenched employees.

[6] The chronology of events which culminated in the second to further applicants dismissal is that on 30 November 2008 the respondent lost the Eskom contract. Two weeks later J and J Cable Jointing secured a less lucrative contract from the Ekurhuleni Municipality. In March 2009, the demand to raise the hourly rate of remuneration of the second to further applicant of R16.89 was made. On 30 July 2009, the respondent issued the first applicant with a notice to consult in terms of section 189(1) of the LRA. In the notice, the respondent states that the need to commence consultation was due to financial problems.

[7] In paragraph 4 of the notice, the respondent states that salary increments were due on 1 February 2009 in terms of the collective agreement. It refers to the Eskom contract which was lost in November 2008 and to its reliance on sub-contractors from municipalities. The respondent further states that, at that stage, it had no active contracts. Dealing with alternatives to retrenchment the respondent proposes that employees will work for J and J Cable Jointing through labour brokers. In the same notice, a further proposal is that after retrenchment the respondent intends to employ through labour broker services.

[8] The respondent offered no plausible explanation for the loss of the Telkom contract in November 2008 which led the respondent to issue a notice of its intention to retrench on 30 July 2009. Magagula testified that from 30 November 2008, the respondent carried the second to further applicants. While he conceded that J and J Cable Jointing got the Ekurhuleni Municipality contract two weeks after the termination of the Eskom contract, he explained that it was less lucrative.

[9] The cause of the respondent's financial difficulties and the alternatives to retrenchment proposed by the respondent paint a different picture for the real reasons for retrenchment from the one the respondent attempted to paint. When the evidence of the reasons for retrenchment is considered in its totality it proves that when the respondent could not pay the increment prescribed in the collective agreement, instead of engaging the first applicant in finding a solution which could keep the respondent in business and protect the jobs of all its employees, it

opted for dismissing employees. Under cross-examination, Magagula testified that had the applicant not insisted on its members being remunerated at the rate prescribed in the collective agreement, the respondent would have afforded to keep them in employment. For reasons I will provide when dealing with the procedural fairness of the second to further applicants' retrenchment, I have accepted that there was an agreement between the respondent and the first applicant that Bengequla would inform the respondent at a meeting scheduled for 4 December 2009 whether the second to further applicants would accept the hourly rate of R11.55 and forfeit the increment as an alternative to retrenchment. The respondent dismissed the second to further applicants before the scheduled meeting could be held and denied Bengequla the opportunity to convey the second to further applicants' acceptance of the hourly rate of R11.55 which the respondent could afford. Magagula conceded that when the second to further applicants were dismissed on 4 December 2009 the respondent could afford to keep them in its employ at the remuneration rate of R11.55 an hour. The respondent can therefore not rely on its inability to remunerate the second to further applicants at the rate prescribed in the collective agreement as a reason for dismissal. That reason had fallen away at the time the dismissal letters were issued and the respondent has itself to blame for depriving itself of that piece of crucial information.

[10] One of the causes of the respondent's financial difficulties as stated in the retrenchment notice was that the respondent had no active contracts at the time the notice was issued on 30 July 2009. One is forced to wonder how the respondent managed to keep the second to further applicants in its employ from 30 July 2009 to 4 December 2009 without active contracts. As it is common cause that some employees of the respondent were not retrenched, they continued working despite the non-existence of active contracts. The respondent either did not need active contracts to provide work for its employees or it in fact had active contracts. The absence of active contracts therefore did not cause the respondent financial difficulties. The real reason for the second to further applicants' retrenchment was that the respondent wanted to get rid of them as

employees and use employees of labour brokers. This is clear from paragraph 5.2 of the notice of retrenchment which reads as follows:

> 'After retrenchment the close corporation intends to employ through labour broker services.'

[11] Section 213 of the Labour Relations Act 66 of 1995 (the LRA) defines operational requirements as 'requirement based on the economic, technological, structural or similar needs of an employer'. No evidence was led by the respondent to prove that the second to further applicants were dismissed for the respondent's operational requirements. Dismissing employees solely to use those same employees as employees of a labour broker falls outside the realm of operational requirements. In *SAA v Bogopa and Others,*[2] it was held that an employer should not use its power to dismiss for operational requirements to rid itself of employees for alleged poor work performance. The court further found that it is wrong in principle to dismiss employees under the guise of operational requirements when the true reason for the dismissal is misconduct. In the present matter, therefore, the respondent cannot be allowed to dismiss the second to further applicants under the guise of operational requirements when the true reason is to rid itself of its own employees only to create space for employees of labour brokers. No reasons were advanced by the respondent for its willingness to prefer the services of the second to further applicants when rendered by them as employees of labour brokers instead of using the services of their own employees.

[12] In the circumstances, I find that the respondent has not proved on a balance of probabilities that the reason for the second to further applicants' dismissal was for operational reasons. The substantive fairness of the dismissal was not proved. In the circumstances I find the dismissal of the second to further applicants for operational reasons substantive unfair.

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[2] [2007] 11 BLLR 1065 (LAC) at para 61.

Procedural fairness:

[13] The respondent bears the onus to prove the procedural fairness of the dismissal of the second to further applicants for operational requirements. Section 189 of the LRA enjoins an employer contemplating dismissing employees for operational requirements to consult, *inter alia*, with a registered trade union whose members are likely to be affected by the proposed dismissal. The consultation is required to be a meaningful joint consensus seeking process.

[14] It is common cause that the respondent issued the first applicant with a notice in terms of section 189(1) of the LRA on 30 July 2009, inviting it to consult on retrenchment as it was encountering financial difficulties. The first consultation meeting was held on 13 August 2009. The parties consulted on the respondent's financial position, amounts of money due to the second to further applicants in terms of the collective agreement, use of labour brokers, audited financial statements, measures to avoid retrenchment, appointment of a facilitator proposed agreement to be provided by the first applicant. The second consultation meeting was held on 13 November 2009. Amongst the issues that the parties reached consensus on was that the date of the termination of the services of the second to further applicants was changed from 13 October 2009 to 4 December 2009. The parties could not reach consensus on the rate of remuneration as the first applicant insisted that its members be remunerated at the new rate prescribed in the collective agreement, but the respondent proposed the rentention of the old rate which it could afford. Under cross-examination, Magagula conceded that, at the consultation meeting of 13 November 2009, the consulting parties agreed that Bengequla would present to the second to further applicants the respondent's offer that the rate of remuneration should remain unchanged and if an agreement was not reached on that issue, their contracts of employment would be terminated.

[15] Bengequla testified that the respondent reneged on the agreement that the would communicate the second to further applicants' response on the offer of the rate of remuneration to the respondent on 4 December 2009 by issuing the dismissal

letters before he could communicate their response. Magagula denied and testified that the respondent was informed by the attorneys who were assisting it at the time that Bengequla had told them before 4 December 2009 that the second to further applicants had declined the respondent's offer to keep the remuneration rate unchanged. The respondent did not call the attorney who conveyed Bengequla's purported response on the remuneration rate and provided no explanation for such omission. Bengequla led clear evidence on the issue which was not challenged under cross-examination. His evidence was generally consistent and he did not waiver under cross-examination. The same cannot be said about Magagula who contradicted himself. For these reasons I accepted Bengequla's version that he did not tell the respondent, either directly or through its attorneys, that its offer had been declined by the second to further applicants.

[16] Magagula attempted to justify the respondent's conduct of issuing dismissal letters prematurely by accusing the first applicant of causing delays during the consultation process by raising issues provided for in the collective agreement. He, however, conceded under cross-examination that the issues raised by the applicants were relevant. Further concessions made by Magagula regarding delays in the finalisation of the retrenchment process were that the applicant attended all the consultation meetings, the respondent never complained about delays caused by the first applicant and that the respondent delayed in appointing a facilitator. Magagula conceded under cross-examination that had the respondent received the information that the second to further applicants had accepted its offer to keep the remuneration rate unchanged, the reason for the retrenchment would have fallen away and the second to further applicants would not have been retrenched. He further conceded that the respondent did not apply LIFO in selecting employees for retrenchment, but retained those employees who accepted the respondent's offer to keep the rate of remuneration unchanged.

[17] The applicants' version and the concession made on behalf of the respondent reflect that the respondent failed in its duty to engage with the first applicant in a

meaningful joint consensus-seeking process, because although the parties reached consensus that Bengequla would communicate the second to further applicants' response to the respondent on 4 December 2009, the respondent reneged on that agreement and dismissed the second to further applicants before giving Bengequla an opportunity to convey their response. The respondent's premature and unfair conduct rendered the second to further applicants' dismissal for operational reasons both substantive and procedurally unfair. The gravity of the substantive unfairness of the second and further applicants' dismissal on its own justifies an order of their reinstatement.

[18] I found no reason both in law and in fairness for costs not to follow the result.

<u>Order</u>

[19] In the premises, the following order is made:

1. The dismissal of the second to further applicants whose names are listed in table A for operational reasons was substantively and procedurally unfair;

2. The respondent is ordered to reinstate the second to further applicants;

3. The respondent is ordered to pay the first applicants' costs.

LALLIE, J

Judge of the Labour Court

Appearances:

For the Applicant:	Advocate Zondo
Instructed by:	Fingure Phukubje Inc. Attorneys
For the Respondents:	Mr. Mothobi of D B Contracting North CC