REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS1117/09

In the matter between:

NATIONAL UNION OF MINEWORKERS **First Applicant**

MESCHACK SHONGWE AND 13 OTHERS

(WHOSE NAMES APPEAR ON

ANNEXURE A) **Second to Further Applicants**

and

ASSMANG LIMITED **Respondent**

Heard: **19 September 2011, 14 May 2012**

Delivered: **19 April 2013**

Summary: **Large scale retrenchment. Dismissal substantively fair.**

JUDGMENT

AC BASSON J

Introduction

[1] This is an action in terms of section 191(5)(v)(ii) of the Labour Relations Act[1] ('the LRA') in which the second to further applicants ('the 14

[1] Act 66 of 1995.

individual applicants') dispute the fairness of their dismissal for operational reasons on 14 August 2009. The applicants seek reinstatement and compensation as the relief should the Court find that their dismissal was substantively unfair.

[2] The action that was referred to this Court also disputed the procedural fairness of the dismissal. I have ruled that the dismissals in this particular matter were part of a large scale retrenchment exercise and therefore the provisions of section 189A of the LRA are applicable. The applicants are therefore precluded in terms of section 189A(18) of the LRA from disputing the procedural fairness of the applicants' dismissals on the basis of operational reasons.

<u>The parties</u>

[3] The First applicant is the National Union of Mineworkers on behalf of Mr Meschack Shongwe and thirteen others (the second to further applicants). The respondent is Assmang Limited. This dispute is confined to the respondent's operations at Machadodorp Works.

<u>The facts</u>

[4] Most of the facts were common cause and I will suffice with a brief summary of the relevant facts.

[5] It was common cause that, at the time of the retrenchments, four trade unions were representing employees of the respondent. They were the National Union of Mineworkers ('the NUM' – the first applicant); the National Union of Metal Workersof South Africa ('NUMSA'); Solidarity and UASA. It was common cause that Solidarity and NUMSA enjoyed majority status.

[6] It appears from the evidence that as a consequence of the serious economic downturn which occurred late in 2008, the respondent experienced a significant drop in sales and oversupply of ferrochrome in the market. The respondent took a decision to drastically cut back on production and to curb production costs. In this regard, Mr Meintjies (the

then General Manager of the respondent),testified that there was a significant reduction in the price of ferrochrome and a reduction of some 80 percent in the volume of sales. This had resulted in the cost of labour increasing from R600.00 per ton in July 2008 to R 1032.00 per ton in March 2009.The global economic meltdown also resulted in a 40 percent reduction in the volume of ferrochrome produced at Machadodorp Works. As will be pointed out, one of the consequences of the downturn in sales was the decision to reduce the output of the furnaces.

[7] In December 2008,the respondent took a decision to drastically cut back on production. As one of the measures to avoid a possibleretrenchment, a collective agreement (‘The Extended Leave Agreement’) was concluded with NUMSA and Solidarity. In terms of this agreement,employees were able to exhaust their annual leave entitlement. The agreement affected employees employed in all categories at Machadodorp Works.Voluntary separation packages were also offered to the workers.

[8] Before the decision to consider retrenchment was taken, the respondent therefore had already exhausted the option of extended leave as well as voluntary retrenchment. Posts were furthermore frozen and the respondent had targeted fixed term contractors. The labour costs of R5 to R6 milliona month for fixed term contractors were reduced in March 2009 to R1 million a month. The voluntary retrenchment option was extended a few times and was further extended for the last time to the end of May 2009. Despite the deadline, the voluntary retrenchment option was again extended to 15 July 2009. A number of employees did apply for voluntary retrenchment.

<u>The section 189(3) Notice</u>

[9] A formal section189 (3) notice in terms of the LRA was issued on 6 April 2009. The notice, *inter alia*, advised organised labour of the economic downturn and the urgent need to restructure. NUM was also specifically invited to the meeting to be held on 24 April 2009.

Meeting on 24 April 2009

[10] Prior to the commencement of the formal consultations, the respondent held a special meeting on 24 April 2009 with all the unions including with NUM (Mr Khambule attended).During this meeting, the following issues werediscussed: the company's performance, the operational plan for 2009/2010 shut down periods, alternatives considered before contemplating any retrenchment, the number of employees likely to be affected; andmeasures to minimisethe possible number of retrenches. The presentation was done in the manner of a slide show. The financial situation of the respondent was discussed. The respondent explained to the meeting that there was at present a drop of40percent in sales. During this presentation, the respondent indicated that the contractor's costs would fall from a high of R6 millionto a low of only R1 million a month in March 2009. The fact that labour costs per ton in March 2009 had soared considerably as a result of the drop in sales, was also discussed.

[11] It was also specifically discussed that, dueto the drop in demand, it was decided to close two of the four furnaces operating in Machadodorp Works. The minutes of the meeting reflect that only two furnaces would be operating for the next two years depending on the market conditions. The minutes further reflect that two of the furnaces were already shut down in November 2008. If regard is had to the slides that were used for the presentation, it is clear that it indicated that Furnace 3 was shut down in November 2008 and Furnace 2 was shut down from December 2008. Furnace 5 was shut down from November 2008 but would operate in April and May 2009 and again shut down in June 2009. Furnace 1 would be shut down in June 2009 for repairs. On this point, I must indicate that there was some disagreement between Meintjies and Mr Shoba (who testified on behalf of the applicants) about when and whether the furnaces were indeed shut down. In this regard, I must point out that if regard is had to the slides and the minutes, it is clear that at least two furnaces were shut down during late 2008. These dates for shutdown were,therefore,known to the parties long before this trial commenced. There is no indication from the papers and specifically the minutes of the

various meetings that it was ever disputed that the furnaces (at least two) were at some stage shut down. The applicants are also vague in their statement of claim in respect of their version regarding the closure of the furnaces. However, as will be pointed out, it was common cause -even Shoba admitted this-, that the parties have agreed on the operational plan as set out in the minutes of 24 April 2009. This operational plan clearly shows that two furnaces were shut down. For purposes of deciding this dispute, I am therefore accepting that at least two furnaces were shut down and were non-operational at the time of the meeting in April 2009.

[12] During this meeting, feedback was also given regarding the extended leave agreement and the voluntary separation packages that were offered. The meeting was further informed that there would be no further appointments and promotions. At the meeting, the first date for consultations was set for 7 May 2009.

[13] It appears that, at the time of the issuing of thesection 189(3) notice, approximately 234 of the 667 workforce were targeted as possibly affected by a retrenchment. Ultimately, only 45 employees were identified for retrenchment. 27 of these employees (all NUMSA members) were not retrenched following an agreement with NUMSA in terms of which these NUMSA members wouldretain their jobs but their salaries would be paid by other NUMSA members who would forfeit part of their salaries. The "savings" generated by the forfeiture of the salary increase was in the case of NUMSA members sufficient to pay their full salaries. (I will return to this agreement herein below.) A number of employees were also accommodated in other positions and that also resulted in a reduction in the number of retrenches.

<u>The first consultation meeting</u>

[14] The first consultation meeting was held on 7 May 2009. During this meeting,the presentation given on 24 April 2009 was revisited. Broad consensus was reached over a number of issues such as voluntary separation, early retrenchment, and selection criteria. The parties then

agreed to draw up a "Framework Agreement" that would be signed by all the stakeholders. A "Joint Workers Committee" was established to consult with individual employees and to explore and investigate any possible measures to alleviate the current situation.

[15] A further consultation meeting was held on 25 May 2009. This meeting was postponed to 2 June 2009. During June the respondent met with the trade union parties on 5 separate occasions. It was during these discussions under the leadership of the appointedfacilitator that various topics were discussed.

[16] During the consultation process, the respondent presented a business plan to the trade unions including the applicant. The so called new production plan included contemplating closing two of its four furnaces and to reduce the production of ferrochrome. The new production plan was adopted in June 2009 and was accepted by all the unions (including NUM). In terms of the new production plan for 2009/2010, furnaces were closed in November 2008. This operation plan is contained in the minutes of the meeting of 24 April 2009 and was accepted by all the trade unions in June 2009.

[17] On 22 July2009 the Framework Agreement on the Restructuring in respect of the Assmang Chrome Operations was concluded between the respondent and NUMSA. NUM did not sign the agreement. Under selection criteria, it was agreed to use one or a combination of the following criteria: (i) qualifications requirements for the position (this criterium weighed 50 points); (ii) Applied skills and knowledge (thiscriterium weighed 50 points); (iii) LIFO in the case where the scores of employees based on the first two criteria were the same; and (iv) Equity must also be considered. NUM refused to apply these criteria and insisted that only LIFO should be applied. The respondent did not agree with NUM in light of the agreement that was reached with the majority union.Meintjies explained in respect of the agreed selection criteria that because the respondent operated furnaces it was necessary to retain people who were multi-skilled. In order to apply the selection criteria equitably, the respondent developed a software programme. The

programme was then used to assess the employees. The 45 employees who remained were those who scored the lowest. The software programme did not take into account trade union affiliation nor disciplinary records.

[18] Ultimately (as already pointed out),approximately 28 NUMSA members were amongst those who were targeted for retrenchment. 14 NUM members were affected.

The Salary Sacrifice Agreement

[19] An agreement (the so-called 'Salary Sacrifice Agreement') was concludedwith NUMSA in terms of which NUMSA members(employees of the respondent)would be prepared to forego a salary increase due on 1 July 2009 which amounted to a 9% increase on their current wages. This saving would then be paid over to those members of NUMSA who were selected for retrenchment as a salary. In effect, NUMSA members then subsidised the salaries of those NUMSA members who were to be retrenched by foregoing the monetary value of the increase in salary of 9%. Because NUMSA had more members (NUM members were less than 14%), NUMSA members had sufficient funds available to pay NUMSA members their full salaries. The result of this salary sacrifice agreement was that the 28 NUMSA members were not retrenched.

[20] Because NUM had fewer members, a salary sacrifice from their side would not have been sufficient to pay thefull salary to their members (those who were identified to be retrenched). At best, it would have been able to pay them a salary of approximately R 5 445 per month.This would have resulted in the 14 NUM members to accept a huge salary sacrifice. NUM rejected this offer. NUM was unhappy and wanted the respondent to top up the difference but the respondent refused. A letter from NUM's Legal Unit confirmed their rejection of the offer. In fact, on 3 August 2009 NUM made it clear that NUM is a trade union and that it will not be liable for payment of wages or any shortfall in the salaries of employees of the respondent. The respondent's position regarding the proposed salary sacrifices is contained in a letter dated 28 July 2009:

> 'It appears as if there is a serious misunderstanding regarding our discussion on 27 July 2009. The Company's position is quite clear on the matter and I reiterate. In principle the Company has no objection with your proposal. However, the monetary value of the 9%increase to the NUM members not affected is R 76.231 per month and the cost of retaining the 14 affected members is R 158,910 per month. **Due to this, the Company cannot accede to your request**. The only other way to accommodate the 15 affected employees is if they are prepared to accept a package of R 5 445 per month which is the equivalent of the R 76, 231 divided by the number of employees affected. **This is a proposal and not a request**.'

[21] The respondent later responded and stated that this offer was merely a *bona fide* attempt to keep NUM members in its service. The respondent confirmed that NUMSA has accepted this option and this had resulted in 28 NUMSA members not being retrenched. Due to the fact that NUM refused to accept the salary sacrifice proposal, 14 NUMSA members were consequently identified for retrenchment.

Consultation meeting on 7 August 2009

[22] A consultation meeting was held on 7 August 2009. A list of 14 names was presented to NUM. It is clear from this list that some of these employees (NUM members) had very long service with the respondent. Meintjies agreed that these employees had long service but explained that the respondent could not agree on LIFO alone asthey needed skills because of the economic crisis. The parties failed to reach an agreement on alternatives to retrenchment. A final decision was made and notices of termination of service wereissued on 14 August 2009.

[23] Despite the clear evidence of Meintjies in respect of the need to retrench and the evidence regarding the respondent's financial situation, the applicants continued to dispute the general need to retrench and persisted with the contention that the retrenchment was unfair. They based their submission on the contention that two of the furnaces were not closed as per the business plan and secondly, that the respondent re-employed previously retrenched employees inSeptember 2009.

<u>Is there any merit in these submissions?</u>

[24] In respect of the re-employmentissue, a notice dated 28 September 2009 was issued in terms of which it was stated that the re-employment had nothing to do with the market conditions and that the ferrochrome markets were still very volatile and unpredictable. Meintjies also testified in this regard that the respondent could not reasonably have foreseen a temporary increase in the demand for ferrochrome as at 14 August 2009 when the final decision was taken to retrench on the basis of operational requirements.

[25] On the facts presented to theCourt,I find that the respondent had shown that there was, at the time the decision to retrench was taken a valid and fair economic rationaleto retrench. The evidence, which was not seriously disputed, was that there was a worldwide economic crisis in 2009 and that that had resulted in a reduction in the demand for ferrochrome. Meintjies' evidence further was that, as a result of the reduction in the demand, the labour costs per ton had increased significantly. Because of these factorsthe respondenthad as early as December considered measures to avoid retrenchment. The respondent considered the following in the middle of 2009: (i) To reduce contractors' costs from R5 toR6 millionin August 2008 to R 1 millionin March 2009; (ii) To reduce capital expenditure in 2008/2009 financial year from R 299 million to R 88 million in the 2009/2010 financial year; (iii) To reduce labour costs and to consider alternatives to retrenchment. The measures were considered before the section 189(3) notice was issued and certainly underscores the contention that there were huge financial pressures on the respondent. Certainly, as at August 2009, the respondent had a valid economic rationale to retrench.

[26] The respondent concludedthat,after the retrenchment, there was a sudden increase in the demand for ferrochrome. In September 2009, a communication letter was sent out to employees. In terms of this communication, management informed employees that all furnaces would run as a temporary measure. The decision was taken as a temporary measure because of market conditions that remained volatile

and unpredictable. The communication further stated that there was a need for labour a month after the retrenchment. Meintjies conceded that had they known that the markets would improve in September he would not have retrenchedbut, at the time of the retrenchment, there was a need to retrench. On behalf of the applicants, it was put to Meintjies that in light of this communication there was no reason to retrench. Meintjies testified that,at the time the decision to retrench was taken, not all four of the furnaces were operating in full capacity and that the respondent had experienced a drop of 40% in sales. He testified that they could not have foreseen the sudden demand for ferrochrome in September 2009.Mr VanAs reminded the Court in respect of this point that the case before this Court was not whether it was unfair not to re-employ the retrenched employees as this was not pleaded nor does this Court have jurisdiction. It was conceded on behalf of the applicants that this was indeed not their case. What was their case was that a month after the retrenchment the respondent operated at an optimal level. Meintjies did not dispute the fact that there was a sudden increase in the demand for ferrochrome. Meintjies testified that the responded decided to recall those employees who had taken voluntary retrenchment and those 27 members of NUMSA who were not retrenched as part of the salary sacrifice deal. There was, therefore, no need to pay extra for them. Meintjies could not recall how long the furnaces were switched on. He could merely recall that they were switched on at the end of 2009. I should, however, point out that the September issue does not form part of the applicant's statement of claim: No averments are made in the statement of claim that the respondent had operated at an optimum in September 2009 nor is the averment made that other employees were recalled to operate the furnaces in September 2009.

[27] I am satisfied that the respondent had a valid economic rationale in taking a decision to retrench as on 14 August 2009. I am further satisfied that there was a proper consideration of alternatives before the respondent embarked on the retrenchment exercise: An extended leave agreement was concluded with NUM and UASA. An offer was also made for voluntaryretrenchment packages. This offer was later extended to 15

July 2009. An offer for early retirement was made to those who would qualify for early retirement.The use of contractors wasreduced and new positions were frozen. A salary sacrifice agreement was concluded with NUMSA. The same offer was extended to members of NUM,however NUM rejected the offer. Meintjies was cross-examined on the latter offer. He testified that the respondent was not prepared to subsidise the difference of some R 72 000.00 between the individual applicants' salaries and the aggregate amount of salary increases sacrifices of the remaining NUM members as this would not have resulted in a significant reduction of labour cost. I will return to these conclusions hereinbelow.

[28] Mr Shoba on behalf of the applicants testified that they were not prepared to accept this proposal because it would have resulted in a significant reduction in their salaries whereas NUMSA retrenchees would receive their full salaries because the aggregate amount of salary increase sacrificed by the remaining NUMSA members was sufficient to cover the full salaries of the NUMSA retrenchees.

[29] Shoba, further testified that there were no financial problems and, therefore,the respondent had no reason to dismiss. He also insisted that he had the necessary skills. Shoba, however, conceded that on 2 June 2009 NUM accepted the business plan proposed by the respondent. He, however, could not answer why not one of the trade unions questioned the rationale for the retrenchment during any of the consultation meetings.

<u>The merits</u>

[30] In deciding the fairness of the dismissal, the Court must consider the provisions of section 189A(19) of the LRA which states the following:

> '(19) In any dispute referred to the Labour Court in terms of section 191(5)(b)(ii) that concerns the dismissal of the number of employees specified in subsection (1), the Labour Court must find that the employee was dismissed for a fair reason if –

> (a) the dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs;
>
> (b) the dismissal was operationally justifiable on rational grounds;
>
> (c) there was a proper consideration of alternatives; and
>
> (d) selection criteria were fair and objective.'

[31] The applicants' main contention was that there was no reason to dismissin light of the fact that the furnaces were not closed down. I have already referred to this issue. I am satisfied that there was a valid economic rationale to retrench as at 14 August 2009. I am also satisfied that two of the furnaces were in fact closed at least during April 2009. In respect of the September events, I have already pointed out that Meintjies conceded that if it was six weeks later, it may not have been necessary to retrench. However, at the time of the retrenchment the respondent had a valid and fair economic rationale to retrench. It is indeed unfortunate to the employees that the markets did not turn around earlier. However, can it be said that their retrenchment was unfair merely because six weeks later the market turned? I have carefully considered the evidence. The respondent could not foresee at the time of the retrenchment that the markets would turn. I have also taken note of the lengths at which the respondent went to avoid retrenchment. The process hasalready started in December with a compulsory leave agreement and culminated in an agreement which resulted in a wage sacrifice. The process took months to complete and many consultation meetings were held. Why would the respondent embark on this lengthy process if there was no economic rationale? Furthermore, no less than four major trade unions were involved in the process. I can,therefore,find no reason not to believe Meintjies' evidence that at the time the decision to retrench was taken, there was a valid economic rationale to retrench. What happened post retrenchment when there was a turn around in the market cannot, in my view, affect the fairness of the decision at the time particularly in circumstances where there is no evidence that the

respondent could have foreseen the upturn in the markets in September 2009. Furthermore, there is no evidence of *mala fides* on the side of the respondent. It is clear from the evidence before the Court that the real reason for the retrenchment was the drop of 40% in production. This resulted in the furnaces not operating at full capacity or not operational at all. In respect of the dispute that exists about whether the furnaces were closed, I have already indicated that it is clear from the business plan presented to the unions in respect of the furnaces that some furnaces were shut down. It was common cause that this operation plan was accepted by the trade unions. If two of the furnaces were not shut down, the question arises why then did the four tradeunions agree to the plan? Shoba's evidence that all four furnaces operated cannot therefore be accepted.

[32] I am, therefore, satisfied that as of 14 August 2009 when the decision was taken to retrench, the respondent had a valid and fair economic rationale to retrench.

[33] In respect of reasonable alternatives, I am of the view that all reasonable alternatives have been explored. I have also considered whether the salary sacrifice agreement constituted a reasonable alternative to retrenchment and I am satisfied that it did. NUMSA and its members were prepared to sign such an agreement. If NUM and its members were prepared to sign the agreement it would have resulted in the individual applicants remaining in the employ of the respondent and at least receive a portion of their salaries. In any event, this did not happen as NUM and its members did not accept the proposal.

[34] In respect of the selection criteria, it is clear from the framework agreement what the selection criteria were. NUM did not agree to these selection criteria and instead proposed LIFO as the exclusive selection criteria. Because the other trade unions represented by far the majority (approximately 85% of the employees), the criteria proposed by themajoritywere applied. I can find no reason to conclude that these criteria are not fair, nor that they were nor fairly applied. In fact, the respondents went at great lengths to ensure that they were fairly and

objectively applied. I therefore find that the selection criteria were fair and objective.

[35] In light of the fact that this Court has found that the four requirements for a fair dismissal were satisfied, it is concluded that the dismissal of the individual applicants was fair. I can find no reason why costs should not follow the result. My order is that only the first applicant is to pay the costs.

[36] In the event, the following order is made.

36.1 The dismissal of the second to further applicantswas substantively fair.

36.2 The first applicant is ordered to pay the costs of this application.

AC BASSON J

Judge of the Labour Court

APPEARANCES:

For the Applicants: Advocate M Zondo

Instructed by: Finger Phukubje Incorporated

For the Respondent: Advocate M Van As

Instructed by: Cliffe Dekker Hofmeyr Incorporated