REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS413/09

In the matter between:

NATIONAL UNION OF METAL WORKERS

OF SOUTH AFRICA (NUMSA) **First Applicant**

S.MBONAMBI AND ANOTHER **Second to Further Applicants**

and

FELTEX AUTOMOTIVE TRIM (Pty) Ltd **Respondent**

Heard: **4 March 2013 & 5 March 2013**

Delivered: **05 June 2013**

Summary: Issue for decision whether dismissal of second to further defendants was substantively unfair, and if so, ordering the company to reinstate applicants retrospectively on same terms and conditions of employment with effect from date of dismissals. Evidence at trial was that sales of the company's car components to its customers, car manufacturers, was so badly affected by the 2008, 2009, 2010 world wide economic recession that it had no alternative but to embark on a cost cutting exercise in order to survive. For consultation purposes

it provided applicants with its own proposals for compliance with section 189(3) requirements for retrenchment. After several consultation meetings, under the auspices of the CCMA, which failed, the matter was referred to this court for determination. Court found on evidence presented by the parties that the company did engage in a genuine joint consensus seeking process on all the issues that had to be achieved under the section and therefore there had been proper compliance with the section. Application dismissed.

JUDGMENT

KUMALO, AJ

Background facts

[1] The first applicant is the National Union of Metalworkers of South Africa (NUMSA), a trade union registered in accordance with the provisions of the Labour Relations Act, 66 of 1995 (LRA).

[2] The second to further applicants are Mr Sibusiso Mbonambi and Mr Caiphus Tshukudu, who are members in good standing of the union and former employees of the respondent before they were dismissed.

[3] The respondent is Feltex Automotive Trim (Pty) Ltd ('the company'), duly incorporated in terms of the company laws of South Africa, situated at 41 Martinus Ras Street, Rosslyn, Pretoria.

[4] The respondent company manufactures automotive components, boot trimmers for supply to automobile companies, in particular, BMW, Ford/Nissan and GMSA.

[5] During or about 2008, the automobile industry suffered heavy losses as a result of the global economic recession. This resulted in the respondent's main

customers, to wit, BMW reducing their motor vehicle production from 55,000 units to 48,000 units. Ford also reduced their production from 72,000 cars to 33,000 cars. The respondent's response to the reduced demand for its products was also to reduce its production of the automotive products.

[6] The production levels continued to dwindle and the respondent had to proceed with initiating the consultation process with the union.

<u>The consultation process</u>

[7] On or about 29 January 2009, the company and the union commenced consultation over what the company referred to as possible redundancy/operational requirements termination.

[8] At the first consultation, the company offered voluntary severance packages which would reduce its headcount from 233 employees to 156. The respondent stated that during December 2008, eight salaried employees took voluntary packages and 19 had voluntarily left employment and were not replaced. The respondent had in its employ about 72 labour broker employees who were on the Motor Industries Bargaining Council (MIBCO) rates of pay, and wanted to reduce its labour costs to 12% turnover. The facilitation process was adjourned to 4 February 2009. It was agreed that the company will furnish the union with the following information prior to the next consultation:

8.1 The 2007 – 2008 audited financial report/statement;

8.2 the 2008 – 2009 audited financial report/statement;

8.3 the total number of labour broker employees and their job categories.

[9] On the 4 February 2009 consultation, the respondent company presented the following information:

9.1 The company had undertaken investigations and had identified positions that would be affected by retrenchment:

9.1.1 That five full time positions will become redundant;

9.1.2 The company will offer alternative employment to the 5 employees affected on condition that they accept MIBCO rates of pay.

[10] The union's response was that there was no need for the company to retrench the full time employees as the company employed about 72 broker employees. In the event that the company was to retrench, then:

10.1 any employee who is offered re-employment within a period of 36 months, such employee must be employed on conditions no less than those that applied before they were retrenched;

10.2 if any employees were to volunteer for retrenchment, they should be replaced immediately.

[11] At the next consultation held on 12 February, 2009, the company reduced the number of employees to be retrenched to 25. The company stated that 16 labour broker employees and five full time employees will now be retrenched.

11.1 The company further increased severance pay to 2 weeks for each completed year of service with the company.

11.2 The company stated that should any transfer of employees to another position be made, such will be done on reduced rates of pay. This was an alternative to dismissal.

[12] The union in evidence said it had earlier undertaken its own investigations which revealed that the positions of the individual applicants were not redundant. The union demanded that individual applicants be retained and in the event that the company proceeds to retrench them, the following proposals should be considered:

12.1 The individual applicants should be redeployed to the positions occupied by the 72 labour broker employees, retaining the same rates of pay they were earning.

12.2 Should the individual applicants however be forcefully retrenched, they must be given first preference when vacancies arise within 36 months on no less favourable terms that those they enjoyed before their dismissals; and

12.3 that each individual applicant be paid an amount of R350,000 ex-gratia over and above the MIBCO severance package.

[13] During the consultation, it was explained to the union retaining the retrenched employees' rates of pay was unaffordable to the respondent. The respondent counter-proposed to employ the dismissed employees to the positions occupied by the labour broker employees at the rates paid to labour broker employees which were on par with MIBCO rates. The union rejected the respondent's offer.

[14] The union's proposals were also rejected as the respondent wanted to give preference to the dismissed employees whenever any position became available. They would be paid the rate that applied to the vacant positions. The respondent regarded the union's proposed R350,000 as ex-gratia and salaries above MIBCO severance package, as totally unrealistic given the company's financial woes.

[15] An impasse having been reached, the respondent company retrenched the two applicants on the 28 February 2009.

[16] The union referred the dispute challenging the fairness of the dismissal of the second to further applicants to the Bargaining Council for the Motor Industry on 29 June 2009.

[17] The bargaining council issued a certificate of outcome of the dispute on 6 November 2009 confirming that the dispute concerning the unfair dismissal of the second to further applicants remained unresolved.

<u>Onus of proof</u>

[18] As the onus of proof that the dismissals for operational reasons were fair, Mr Ganswen S Murugan, who was a production controller at the respondent's Rosslyn plant at the time, gave evidence first for the respondent company.

[19] He stated that he was involved in the consultation process together with Ms Dolly Msomi, the HR Manager, who is now deceased. He referred to the respondent company's "Proposal: Redundancy due to Operational Requirements Feltex Trim Rosslyn 2009" which was in the form of slide presentations which he said was done on more than one occasion to the union. In summary form, the slide presentations dealt with following requirements of section 189(3):

19.1 a. Reasons for the proposed dismissals: Reduction in production volumes by 41%: BMW 55,000 cars to 48,000 and Ford from 72,000 to 33,000.

b. The alternatives the employer considered before proposing dismissals and the reasons for rejecting each of those alternatives. Considered short time – already the Ford production line is on a 4 day working week – cannot afford to increase short time due to production capacity to meet customer daily needs. Offered voluntary packages to 19 employees, who left in December 2008, to minimise the impact of forced retrenchments.

c. The number of employees likely to be affected: 21 positions.

d. The proposed method for selecting which employees to dismiss. The company is proposing to use skill and affordability.

e. The time when or period during which the dismissals are likely to take effect: from 28 February 2009 due to time pressure caused by drastic changes in economic climate. This is mainly to sustain the business and not to undermine any legislation.

f. Severance pay proposed: As per the MIBCO agreement ie 2 weeks for the 1st 4 completed years of service; thereafter 1 week for each completed year of service.

g. Any assistance employer proposes to offer employees likely to be dismissed: financial management training to assist employees to learn techniques of investing their money.

h. Possibility of future re-employment of dismissed workers. Should the economic situation within the company improve, employment opportunities will be offered firstly to affected employees if they remain unemployed.

i. The total number of employees employed by the company: 166.

j. The number of employees dismissed for reasons based on its operational requirements in the preceding 12 months:

In January 2008, there were 240 employees: 19 accepted voluntary packages as at end of December; 13 salaried jobs became redundant and have been terminated; 35 contract workers have been terminated; and 7 normal retirements not replaced.

[20] Referring to the letter dated 23 February 2009 from the first applicant (p 7 Annexure B), Murugan said he disagreed that the respondent company had failed to prove that the positions and/or jobs performed by the second to further applicants were redundant. He said the alternative employment the company proposed was for the applicants to take up a different job at a lower rate of pay. In that way service with Feltex Automotive Trim would be maintained. Moreover, the ex gratia payment offered to them would cushion the effect of the lower pay. The letters dated 26 February 2009 from the company (at pp19 to 22 Annexure B) confirmed the retrenchment package offered to the applicants, and, though their services would be terminated on 31 March 2009, the company would release the applicants immediately with full severance package so that they

would use the time to seek alternative employment. The severance pay would be based on two weeks wages for each completed year of service plus a pro rata bonus and all outstanding leave pay. Tshukudu had 19 years service and the severance pay amounted to R118,056.20 without the outstanding bonus and leave pay which would be calculated at the time of termination of employment. The amount for Mbonambi was R13,652.04 based on 3 years service.

[21] Tshukudu rejected the retrenchment offer; Mbonambi signed and accepted it, though at trial he said he signed under duress, if he did not sign he would not get anything. This was supposedly said by the managing director of the plant who he said was also a shareholder.

Evidence of second applicant

[22] Mr Sibusiso Mbonambi gave evidence. He stated that he started working for the respondent company in March 2003 at its Durban plant. He was transferred to the Rosslyn plant where he was production supervisor until his retrenchment. There were two of them in his team exchanging shifts. He had two operators reporting to him. At the end of November 2008, he was verbally asked by Murugan to replace Sifiso who was the process engineer. In 2008, they worked on a project from TC6 which was to make a new development product for a client. There was a student, Lyndall, who had come for in service training to get her qualifications and Thabo, who was a labour broker employee. They were both reporting to him.

[23] He had been in the process department for three weeks when in December 2008 he received a retrenchment letter, dated 12 December 2008, giving him four weeks' notice of termination of employment. In terms of the notice, he was required to work his notice period until 31 January 2009. He would also receive outstanding leave pay, severance pay two weeks per completed year of service, withdrawal from the provident fund and in terms of the Provident Fund Rules would be paid a benefit according to the rule applicable to retrenchment.

[24] He took the letter to the first applicant's representative, Mr Sekome Tshoga, who contacted the HR Group Manager, Mrs Msomi, informing her that the retrenchment letter did not comply with the provisions of section 189(3) LRA. Hence the respondent company withdrew it on 14 January 2009.

[25] He said that he did not participate in the consultation process. He relied on the feedback from the union representatives and shop stewards. He recognised the retrenchment notice which he had signed but said it was not numbered, saw only the amount he was to receive. He maintained that his position was not redundant.

[26] In cross examination, he said he was asked by Kobus Ooshuysen, the plant manager, to sign the retrenchment notice (page 20 Annexure B). He was told to sign, negotiations would follow. He saw the figure of R13,652.04. Money was important to him. He said he was told that he would not get that money if he did not sign. He knew Kobus to be a director and shareholder, he felt he was forced to sign, everything was done hastily. He wanted to give it to his shop steward to be advised. He denied that he signed knowing that it was in full and final settlement.

[27] He said he had a Diploma in Production Management, having done a three year Technikon course before joining the company in 2003. The LIFO principle should have been applied.

<u>Evidence of Caiphus Tshukudu</u>

[28] In evidence he said he started working for the company in September 1989 as a machine operator. This was at its Durban plant. In June 1999, he became a production clerk till 2008. He explained how they were allocated work: management would first check to see what materials the company had and whether their customers, Toyato, Daimler Chrysler had the necessary materials at affordable prices and to see how long the job would take and how many people will be required to execute it.

[29] He denied that in 2008 there were any reductions or cut backs in production. He was requested to go and help in the container section, reason being that the company was losing a lot of money. He was shown the sales figures and also sales figures for something the company did not do.

[30] He said the logistics manager was Liam who had started in April 2008. There was also Tommy de Beers who joined as a learner, fresh from college. This was towards the end of 2007. He said that he taught him how work was done inside the factory, was supervising him and giving reports on his training, up to the time he took over his job.

[31] He stated that in December 2008 during the Xmas shut down he received the retrenchment letter.

[32] As a shop steward, he attended all the consultation meetings. The others present were Mrs Dolly Msomi, Group HR Manager, the plant manager, the process and quality manager, the production manager, the union organiser for the region Mr Sekome, shop stewards from NUMSA, Shirley Motsepe from SACTU. He said Murugan was never part of any of those meetings.

[33] He said the union came up with several suggestions like to watch over casual workers, to reduce the hours of work, to check those who intend to leave voluntarily, check what the position was in other companies affiliated to Feltex and to reduce money wastage and/or any other ways of reducing costs. The intention of the union was to save the jobs of their members but the respondent employer had no intention of going through proper consultations. When he asked why he had been selected for retrenchment, he said he was told he did not have sufficient skills and that was said in a racist manner.

[34] In cross examination, he disputed that there was an economic downturn leading to lower car sales by their customers which in turn meant that their own production and sales went into a dip as well. When he was shown the sales figures that were used in the slide presentations, his response was that they

were not his figures so he could not accept them but neither he nor the union had any documents with financial figures. He said the company did not offer them any alternative positions and that the reason for that he is that they were being victimised for being members of NUMSA, and he for being a shop steward. But under cross examination he could not explain why his union never complained to the respondent company about any racism or victimisation of its members, either before or during consultation. Furthermore, neither complaints were stated in the pre-trial minutes nor in his statement of case.

<u>Evidence of Mr Sekome Tshoga</u>

[35] Mr Tshoga said in evidence that he was the local organiser of NUMSA and the Rosslyn plant fell within his jurisdiction. Prior to the consultation meetings under the auspices of the CCMA, he had been shown the retrenchment notices served on Mbonambi and Tshukudu dated 12 December 2008. He spoke to the company HR Manager pointing out that the notice did not comply with the requirements of section 189(3) LRA. Hence the company withdrew the notices of retrenchment on the 14 December 2008.

[36] He was adamant in his evidence that Murugan, whom he knew, was not in any of the consultation meetings held under the auspices of the CCMA and therefore whatever he said in evidence was inadmissible.

[37] He said the company had to get rid of casual workers, labour broker employees whose positions should be taken by the union members, retaining their current conditions of service and their rates of pay.

<u>The legal framework</u>

Retrenchment

[38] Employers are frequently compelled for economic reasons, financial viability and sustainability to review their staffing levels and to terminate the employment of some of their employees to effect savings. The dismissals based on operational

requirements are expressly regulated by sections 189 and 189A of the Labour Relations Act, Act 66 of 1995.

[39] The LRA permits employers to dismiss employees for "operational requirements", defined as "requirements based on economic, technological, structural or similar needs of an employer;" (s 213 LRA). This is an expansive definition which is reconcilable with the approach taken by the labour courts that a retrenchment is bona fide if it is designed not only to stem losses but also to increase profits.[1]

[40] In *Johson and Johson (Pty) Ltd v Chemical Workers Industrial Union*,[2] Froneman DJP had this to say about the concept of fairness:

> '[23] Every person has a fundamental right to fair labour practices (section 23(1)(a) of the Constitution). In the present context expression is given to this in the LRA by affording an employee the right not to be unfairly dismissed (s 185) and an employer the right to dismiss an employee for a fair reason based on the employer's operational requirements and in accordance with a fair procedure (section 188(1)(a)(ii) and (b)).
>
> [24] Section 189 regulates the exercise of the competing fundamental rights of an employee not to be unfairly dismissed and that of an employer to dismiss for operational reasons. It is a provision that is intricably linked to the fairness or otherwise of a dismissal based on operational requirements. Apart from that it serves no other purpose.
>
> [26] The section places some primary obligations on an employer in order to ensure that an employee is not unfairly dismissed. The employer must initiate the consultation process when it contemplates dismissals for operational reasons (section 189(1); cf *FAWU and another v National Sorghum Breweries* [1997] 11 BLLR 1410 (LC) at 1420F-1421B, (1998) 19 ILJ 613 (LC) at 623C-1)). It must also disclose relevant information to the other consulting party (section 189(3)). It must allow the other

[1] See *Food and Allied Workers Union and Others v Kellogg SA (Pty) Ltd* (1993) 14 ILJ (IC) at 413A; *NUMSA v Fry's Metals* [2003] 2 BLLR 140 (LAC) at paras 32-3; *General Food Industries v FAWU* (2004) 25 ILJ 1260 (LAC) at para 32.
[2] (1999) 20 ILJ 89 (LAC) at paras 23-29.

consulting party an opportunity during consultation to make representations about any matter on which they are consulting (section 189(5)); It must consider those representations and, if it does not agree with them, it must give its reasons (section 189(6)).

[27] But all these primary formal obligations of an employer are geared to a specific purpose namely to attempt to reach consensus on the objects listed in section 189 (2). The ultimate purpose of section 189 is thus to achieve a joint consensus seeking process. In this manner the section implicitly recognises the employer's right to dismiss for operational reasons, but then only if a fair process aimed at achieving consensus has failed. This is also apparent from section 189(7) which provides that the employer must select the employees to be dismissed on criteria either agreed to, or if that is not possible, on criteria that are fair and objective.

[28] The achievement of a joint consensus seeking process may be failed by either one of the consulting parties. The employer may obviously frustrate it by not fulfilling its obligations under section 189(1), (3), (5) (6) and (7). The other consulting party may do it by refusing to take part in any of the stages of the consultation process, or by deliberately delaying the whole process… It may also appear that any one of the parties simply went through the entire formal process with no intention of ever genuinely reaching agreement on the issues discussed. These different possibilities depend on the facts of each particular case.

[29] If that purpose is achieved, there has been proper compliance with the section. If not, the reason for not achieving the purpose must be sought. If the employer alone frustrated the process in some way or another, there can be no compliance. If the employer was not at fault and did all it could, from its side, to achieve the kind of consultation referred to above, the purpose of the section would also have been achieved.'

<u>Application of the law to the facts</u>

[41] The test as to whether there has been genuine consultation prior to a retrenchment exercise is whether the employees and the union concerned have

been given a fair opportunity to suggest ways in which job losses might be avoided or the effects of retrenchment might be ameliorated.

[42] The employer is not bound to accept the suggestions; they must merely be seriously considered and consultation will not necessarily be held to be a mere pretence if the employer approaches the matter with a pre-disposition to a particular solution: the test is whether management retained a sufficiently open mind to be persuaded by practical and rational alternatives.[3] The final decision, whether to retrench rests with the employer, but the ultimate decision on whether that decision was fair rests with the court.

[43] In *Van Rooyen and Others v Blue Financial Services (SA) (Pty) Ltd*,[4] is a case in point where Van Niekerk J said that a restructuring strategy that was a "life-saving measure" was a valid reason to retrench. The Court accepted that the employer had sufficient justification for its decision to retrench and that it was a necessary measure to prevent the further decline of the business.

[44] In the case *in casu* what is objectively clear from the respondent's evidence is that in the years 2008, 2009, 2010 there was a wide world economic recession that directly led to the respondent's motor vehicle customers drastically reducing production of motor vehicles. That in turn resulted in reduction of sales of motor vehicle components that the respondent company made for its automotive customers.

[45] The evidence of Murugan who was the respondent company's production supervisor was unchallenged in that respect. The applicants could only make a bare denial that there was no reduction in sales of the respondent company's automotive components to its customers. Although they themselves stated that their investigations did not reveal any reduction in sales of motor vehicles and of automotive components, they could not produce a shred of evidence that the

[3] See *SATAWU v Roadway Logistics (Pty) Ltd* (2007) 28 ILJ 937 (LC).
[4] (2010) 31 ILJ 2735 (LC) at para 20.

retrenchment consultation was a sham or was done in bad faith ie without a reasonable and justifiable economic rationale.

[46] I believe, on a balance of probability, that Murugan was telling the truth when he said he attended some of the consultations with the applicants. It is inconceivable that as a production controller and part of management he would not have known or would not have been told by HR Department what the impact of the wide world economic downturn was on the company's sales of automotive components because he was part of management that had to find ways avoid retrenchments and come up with ameliorating measures where dismissals were unavoidable.

[47] On the evidence that the court heard from Murugan, I am satisfied that the company did listen to the representations made by the applicants on measures that it should take to avoid retrenchments for operational requirements and did yield to their demands that casual workers and labour broker employees should be drastically reduced and their positions be taken up by the affected applicants and that the company should offer their members alternative employment.

[48] I am equally satisfied that the allegations of racism and victimisation, leveled at the company, of the applicants on account of trade union membership is spurious and opportunistic because Mrs Dolly Msomi the HR Manager is deceased. One needs to only look at the applicants' pleadings, the pre-trial minutes to show that there is no merit in these accusations.

[49] What is also equally clear is that the applicants were not prepared to move from their demand that the employees should not only keep their jobs at current rates of pay but the employer should over and above that pay each employee an *ex gratia* payment equal to R350,000.00 over and above MIBCO retrenchment package; guarantee re-employment within 36 months from date of retrenchment with no conditions and or conditions not less favourable than it was before their retrenchment. When I enquired from the applicant's witnesses as to how this figure had been reached, Mr Luthuli their representative was unable to provide

an answer even though I had, at his request, allowed him an adjournment to take instructions.

[50] I am satisfied on the evidence before me that the restructuring strategy of the company was a “life-saving measure” and was a valid reason to retrench. I accept that the employer had sufficient justification for its decision to retrench and that it was a necessary measure to prevent further decline of the business. I also bear in mind that the dismissals were not just a “life-saving measure” but that they were necessary to prevent the business from going under completely, given that the prospects for 2012 were not that bright either. In those circumstances, I find that the timing of the dismissals was for a fair reason. Accordingly, the application for an order declaring that the dismissal of the second to further applicants was substantively unfair and ordering the company to retrospectively reinstate the second to further applicants on the same terms and conditions of employment, with effect from the date of their dismissal and costs against the respondent, is without merit and stands to be dismissed.

[51] There remains the question whether the second to further respondents should pay costs either on their own or jointly and severally with first applicant, the one paying the other to be absolved. I am satisfied that this is not an appropriate case in which to make such an order. The evidence of the second to further applicants is that they are unemployed, have young children and their prospects of employment on the open labour market are dim. It would be unfair to saddle them with the extra burden of costs when they do not have the financial ability to pay those costs. In so far as the first applicant is concerned I have no reason to depart from the provisions of section 162(3) LRA that as the applicant is a party to the dispute before this Court, this Court may order costs against it, and, in the light of the role it played, I so order.

Order

[52] In the result, the application is dismissed with costs to be paid by the first applicant.

D Kumalo AJ

Acting Judge of the Labour Court

APPEARANCES

For the Applicants:	Cyril Luthuli, of National Union of Metal Workers of South Africa
For the Respondent:	MG Maeso of Shepstone and Wylie Attorneys