



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JS619/11

In the matter between:

TSHIAMO KENNETH MOGWERE

First applicant

HLAKUDI LEVY MOGANO

Second applicant

DEBORAH KHOPANA

Third Applicant

XOLISWA EUNICE SIMELANE

Fourth Applicant

SMART MORAPEDI

Fifth Applicant

and

DÉCOR WALLPAPER COMPANY (PTY) LTD

Respondent

Heard: 28 to 29 February 2013 and 18 March 2013

Judgment: 10 June 2013

**Summary: Retrenchment on the basis of operational requirements.
Retrenchment substantively and procedurally fair.**

JUDGMENT

AC BASSON, J

Introduction

- [1] This matter concerned the alleged unfair dismissal on the basis of operational requirements of the first applicant (Mr Tshiamo Kenneth Mogwere), the second applicant (Mr Hlakudi Levy Mogano) and the third applicant (Ms Deborah Kgopana). Although there were initially five applicants, the fourth applicant (Ms Xoliswa Eunice Simelane) and the fifth applicant (Mr Smart Morapedi) were not present in Court and were therefore not before the Court.
- [2] The three applicants were dismissed by the respondent (Décor Wallpaper Company (Pty) Ltd) on 8 July 2011 for operational requirements. Both the substantive and procedural fairness of the dismissal were placed in dispute. The three applicants represented themselves.
- [3] It was not in dispute that the three applicants were employed by the respondent: Mogwere was employed as a store assistant in 2004, Mogano was employed as a store assistant in 1983 and Kgopana was employed as a shop assistant in 1981.

Relevant facts

- [4] It appears from the evidence that the respondent delivered a memorandum to various employees on 28 June 2011 to attend individual meetings with management on 29 June 2011. The meetings were held with all three applicants individually. During the meetings the respondent delivered retrenchment notices in terms of section 189(3) of the Labour Relations Act¹ ("LRA") to various employees. Each letter was personalised and addressed the employment

¹Act 66 of 1995.

position of each individual applicant. Letters of termination were handed to the three applicants on 8 July 2011.

- [5] In the section 189(3) notice, the employees are informed of the reasons for the proposed dismissals on the basis of operational requirements. In respect of the first and second applicants, it is stated that the respondent, due to financial reasons, no longer needed the services of three employees to pick orders. As will become apparent herein below, the first and second applicants were employed in the Warehouse Department. Kgopana was informed that her position had become redundant as her functions could be taken over by the current bookkeeper. Because she did not have any other skills than Data Capture and Processing, she could not be utilised in any other capacity within the respondent.
- [6] Ms Leonie Connolly (“Connolly”), the General Manager of the respondent, explained that she is part of the senior management team and that she heads up the Sales Division and all its functions. She is also in charge of all marketing projects, annual sales targets and does general managerial duties pertaining to staff and the turnover of the company. She referred the Court to two organograms: one before the retrenchment and one after the retrenchment. The pre-retrenchment organogram shows that Kgopana was employed as a Data Capture Clerk in Finance and that Mogano and Mogwere were employed in the Warehouse department under Mr Jeff Moodley (the Warehouse Manager). The organogram post the retrenchment shows a slimmed down company. Under the Warehouse Department is now listed only one name namely that of Moodley (the Warehouse Manager). Under finance (where Kgopano used to work) are now only listed Ms Aletta Martin – the Bookkeeper, Ms Winnie Kai – the Credit Controller and Ms Eunice Simelane – the Tea and Cleaning Lady. Simelane is identified as a “part time” employee.
- [7] Connolly explained that the respondent’s sole function is to import and sell wall paper. All three employees worked for Décor Wallpaper Company. Another

company – Décor Interior Contracts (Pty) Ltd operates from the same premises and the organogram features all the employees of both companies.

- [8] Connolly further explained with reference to the section 189(3) notice that although the year (2011) started off with great optimism, the respondent experienced the effects of the recession since June 2011. She explained that prior to the World Cup in 2010, the respondent had a lot of work especially during the time hotels were refurbishing in preparation for the World Cup. When the World Cup ended in 2010 the work in the construction industry almost dried up.
- [9] The respondent had various meetings and discussions on managerial level and by the end of November 2010, it realised that the respondent's sales figures had dramatically went down compared to the same period in 2009. Sales dropped from about 1.7 million in 2009 to about R 900 000.00 in 2010 which constitutes an almost 44% from the previous year. What made matters worse was the fact that November used to be the respondents best month in respect of sales.
- [10] The respondent started to introduce cost saving measures already in 2010 and the respondent looked at reducing spending on fuel, telephone, teas and cleaning. On 9 December 2010 the respondent wrote a letter to all employees thanking them for their hard work. The letter also reminded employees that expenditure had to be kept in check. On 31 March 2011 a further letter was sent to employees in which they were again reminded that expenditure had to be watched carefully.
- [11] The respondent then realised that more dramatic measures had to be taken. One of the measures was to place employees who were due to retire on early retirement. Two drivers were placed on early retirement. A further measure was to offer the three sales representatives commission based remuneration instead of a fixed salary. When the three sales representatives turned down the offer, they were retrenched and replaced by independent contractors who worked on commission only. Their names do not appear on the organogram post-retrenchment.

- [12] Present at the individual meetings on 6 July 2011 were Mr Graham (the General Manager), Mr Fakir, Mr Anton Lombard (the respondent's attorney) and Ms Connolly. Connolly, Mr Fakir (the Financial Manager) and Lombard confirmed the correctness of the minutes.
- [13] I have already pointed out that the third respondent - Kgopana was employed in Finance Department as a Data Capture Clerk. In respect of Kgopana, Connolly testified that the respondent looked at the various functions in the different departments. She testified that it was the view of the respondent that the Bookkeeper (Ms Martin) was able to absorb the functions of the Data Capture Clerk (the position held by Kgopana) but that it was not possible the other way round. She testified that a discussion was held with Kgopana on 29 June when the notice was handed over and that she was asked to come forward with any ideas. She was notified to come to a further meeting on 6 July. The minutes of the meeting show that it was explained to Kgopana that her functions had become redundant. She was asked for any alternatives. She proposed short time and unpaid leave. Both these alternatives were not feasible. The meeting also discussed a possible transfer but Kgopana conceded that she did not have the necessary skills to work in any other department. When no further options could be explored the meeting was adjourned.
- [14] An individual meeting was also held with the first respondent, Mogwere. When he entered the meeting he complained about the presence of Lombard (the attorney for the respondent). Lombard left the meeting. Connolly, Fakir and Graham were present. Connolly testified that Mogwere simply requested his blue card and severance pay and that he informed the meeting that he had been dismissed. It was explained to him that he was not dismissed. He refused to listen to them and said that he would go to the CCMA. The discussion ended when he walked out of the room. She also confirmed the minutes of the meeting as a true reflection of what had transpired. The referral form to the CCMA was introduced into evidence. In the CCMA referral, Mogwere stated that he was already dismissed on 7 July 2011 which is consistent with the evidence of

Connolly that Mogwere left the meeting and that his departing words were that he was going to the CCMA.

- [15] Connolly explained that they also had a meeting with the second applicant - Mogano. Mogano stated to the meeting that he had read the notice but that he did not understand it. The notice was explained to him. Mogano stated that he could do the job of Moodley (the Warehouse Manager). The Managing Director explained to Mogano that he could not do Moodley's job and explained to him that he was previously appointed as a warehouse manager and was removed from the position due to his inefficiency. Mogano then said that the respondent did not meet with the staff because they were Black. The Managing Director took great exception to that because all but three employees of the respondent were Black. Various alternatives were also discussed with Mogano. In respect of Moodley, Connolly explained that Moodley had 15 years' of experience in warehouse management at the time he joined the respondent. He also has a Diploma in Warehouse Management. The Court was also referred to a document containing a list of the representations that were made by Mogano. The document also records why these representations were rejected by the respondent. The document is dated 8 July 2011. The document was handed to Mogano on the later date. Mogano received severance amounting to R52 587.99.
- [16] Connolly explained that the final decision to retrench was taken after the meetings and after management went through the alternatives. She explained that because the first and second applicants were aggressive, the respondent did not require of them to work until 8 August 2011.
- [17] Connolly explained that the sales representatives were retrenched and replaced by independent contractors working on commission only. She also explained that at the time the respondent had two drivers. The one driver retired in March 2011. The other driver (Rommel) retired in November 2011. Rommel was subsequently reappointed as a driver.

Evaluation

[18] I am satisfied that the respondent had a valid economic rationale to retrench. The evidence before the Court was clear namely that the respondent had experienced an almost 37% drop in income and that the financial future of the company at the time looked bleak. It is clear from the evidence that before the section 189(3) notice was issued that the respondent had already taken cost saving measures but that that was not sufficient. It is further clear from the evidence and especially if regard is had to the pre-retrenchment organogram as opposed to the post-retrenchment organogram that the respondent not only targeted these three applicants but that others were also affected. The undisputed evidence also was that the three salaried sales representatives were retrenched and replaced by independent contractors who worked on commission basis only. Two employees were also placed on early retirement. I am also satisfied that the applicant had engaged in meaningful consultations² with all

² In *Johnson and Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC), it was held that: '[25] It is convenient to set s 189 out in full:

- '(1) When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult -
 - (a) any person whom the employer is required to consult in terms of a collective agreement;
 - (b) if there is no collective agreement that requires consultation, a workplace forum if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum;
 - (c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals;
 - (d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.
- (2) The consulting parties must attempt to reach consensus on -
 - (a) appropriate measures -
 - (i) to avoid the dismissals;
 - (ii) to minimise the number of dismissals;
 - (iii) to change the timing of the dismissals; and
 - (iv) to mitigate the adverse effect of the dismissals;
 - (b) the method for selecting the employees to be dismissed; and
 - (c) the severance pay for dismissed employees.

three applicants and that a sound economic rationale existed for their retrenchment. I am also satisfied that the selection of the three applicants for retrenchment was fair. In respect of the third applicant, I am satisfied that her retrenchment was substantively and procedurally fair. If regard is had to her

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- (3) The employer must disclose in writing to the other consulting party all relevant information, including, but not limited to -
 - (a) the reasons for the proposed dismissals;
 - (b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting those alternatives;
 - (c) the number of employees likely to be affected and the job categories in which they are employed;
 - (d) the proposed method for selecting which employees to dismiss;
 - (e) the time when, or period during which, the dismissals are likely to take effect;
 - (f) the severance pay proposed;
 - (g) any assistance that the employer proposes to offer to the employees likely to be dismissed; and
 - (h) the possibility of the future re-employment of the employees who are dismissed.
 - (4) The provisions of section 16 apply, read with changes required by the context, to the disclosure of information in terms of subsection (3).
 - (5) The employer must allow the other consulting party an opportunity during consultation to make representations about any matter on which they are consulting.
 - (6) The employer must consider and respond to the representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing.
 - (7) The employer must select the employees to be dismissed according to selection criteria -
 - (a) that have been agreed to by the consulting parties; or
 - (b) if no criteria have been agreed, criteria that are fair and objective.'
- [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 (s 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-I). It must also disclose relevant information to the other consulting party (s 189(3)); it must allow the other consulting party an opportunity during consultation to make representations about any matter on which they are consulting (s 189(5)); it must consider those representations and, if it does not agree with them, it must give its reasons (s 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 s 189(2). The ultimate purpose of s 189 is thus to *achieve a joint consensus seeking process*. In this manner the section implicitly recognizes 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 s 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 foiled by either one of the consulting parties. The employer may obviously frustrate it by not fulfilling its obligations under s 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 (cf *NEHAWU v University of Fort Hare* [1997] 8 BLLR 1054 (LC); *UPUSA and others v Grinaker Duraset* [1998] 2 BLLR 190 (LC) at 204D; *Fowlds v SA Housing Trust Ltd and another* case no J561/98 (LC) at para [11]). 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.'

duties and the department in which she worked, it is clear that she was unable to do the functions of Winnie Kay who performed the full debtors' functions. I am also satisfied that the respondent had explored all alternatives with her and that no alternative position was available. In respect of Mogwere and Mogano, I am equally satisfied that their retrenchments were substantively and procedurally fair. Neither of them could fulfil the position of the Warehouse Manager as none of them possessed the qualifications and skills that Moodley had. In this regard, Fakir (the respondent's Financial Manager) also confirmed that Moodley possess skills that the first and second applicants did not have. Moodley's duties entail recording of stock and movements in the Warehouse, administration work as far as receipting of stock is confirmed and that he also assisted during stock takings. I am also satisfied despite the protestations of Mogano that they were properly consulted on alternatives.

[19] In the event, I am of the view that the dismissal of the three applicants on the basis of operational requirements was substantively and procedurally fair. I have decided, in light of considerations of fairness, not to make an adverse cost order against the applicants.

[20] In the event, the following order is made:

20.1 The dismissal of the first, second and third applicant was substantively and procedurally fair.

20.2 There is no order as to costs.

AC BASSON, J

Judge of the Labour Court

APPEARANCES

For the Applicants: Applicants appeared in person.

For the Respondent: Advocate S Strydom

Instructed by: Anton Lombard Attorneys