



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JS 207/12

In the matter between:

**NATIONAL UNION OF METALWORKERS OF
SOUTH AFRICA OBO E. HLONGWANE AND
15 OTHERS**

Applicants

and

WILRO SUPPLIES CC.

Respondent

Heard : 11 and 12 March 2015.

Judgment : 16 March 2015.

Summary : Retrenchment unfair: No consultation in respect of selection criteria.

JUDGMENT

AC BASSON, J

- [1] The issue before this Court is whether the retrenchment of the 61 employees was substantively and procedurally fair. It was not in dispute that there was a general need to retrench. The dispute is confined to whether there was a need to retrench the specific individual applicants before Court and whether the application of the selection criteria of “special skills” was applied fairly.

- [2] It is common cause that the respondent (Wilro Supplies CC) had issued the individual applicants with a “Notification of a perceived need to implement retrenchments” on 31 August 2011. This notice sets out the reasons for the proposed retrenchment and fixes the proposed date for the retrenchment as 31 October 2011.
- [3] It is common cause that on 15 September 2011 a consultation meeting was held between NUMSA (the union representing the individual applicants) and the respondent. It was the evidence of Mr Steenberg (the manager of the respondent) that Mr Bhekisisa Mzimelo of the union had informed the meeting that the union will fax a proposal through to the respondent and that the next meeting will then be scheduled. It is common cause that no further meetings were held with the union or with any of the individual applicants nor with the shop stewards after the meeting of 15 September 2011 until 31 October 2011 when the individual applicants were informed of their retrenchment. In fact, Mr Steenberg and Mr Human (the respondent’s operation and technical manager) conceded that they did not contact the union at any stage after the meeting on 15 September 2011. Therefore, for a period of 1 ½ months no attempts whatsoever were made to contact the union either to enquire about the proposal or to schedule a next consultation meeting. More in particular, Mr Human also conceded that he had no individual meetings with any of the individual applicants prior to the dismissal on 31 October 2011 not even to discuss whether they had the necessary skills to fulfil certain positions. Mr Steenberg also conceded that he made no attempt whatsoever to contact the union after the meeting of 15 September 2011. His excuse was that he was waiting for the union to approach the respondent with their proposals.
- [4] It is also common cause that no agreement on the selection criteria had been reached between the company and the union. In fact, no meeting was even scheduled to discuss how employees would be selected for retrenchment. The respondent unilaterally decided to apply “special skills” as a criteria and not LIFO which is generally regarded as an objective criterion. Not only did the respondent unilaterally and without any consultation with the union decide to apply “special skills” as a criterion but also proceeded to apply the criterion with no input whatsoever from the union or from any of the individual applicants.

- [5] Mr Human, the operation and technical manager, testified that he had been with the respondent for approximately 13 years. He also testified that he had many more years' experience in this specific industry. He testified that during October 2011 he in consultation with Mr Steenberg and other managers decided which employees should be retrenched and which employees should be retained. This the company did with no input whatsoever from the union or the individual employees. Mr Human conceded that the selection criterion that he had applied was "special skills" and that he had subjectively decided who had the necessary skills and who did not. His evidence was that he had drawn up a schedule at the time and that he then decided which employees would be able to do more than one particular task in the operation. He was however not able to produce this schedule to the Court. It is also common cause that no such document was ever presented to the trade union or to any of the individual applicants for their input. Mr Human in fact conceded that, although he decided subjectively which employees should be retrenched and which employees should be retained, he never discussed this with the union nor with the individual employees even though his decision adversely affected the applicants. To a question posed by the Court why he did not discuss the selection process and the actual selection with the employees, he conceded that "looking back" they should have consulted with the individual applicants. He also conceded that if he had consulted the individual employees, it is possible that his decision may have been influenced by their input.
- [6] Mr Human gave extensive evidence with reference to a schedule that was prepared shortly before trial why he had decided to retain certain employees and not others. He conceded that he made the selection on the basis of his subjective view regarding the skills and competencies of the different applicants. Apart from Mr Human's say-so in respect of the level of skills possessed by the different applicants, no other documentation was placed before the Court that could have enlightened the Court what skills these individual applicants objectively have and why other employees had better skills than they. Although Mr Human was adamant that he was best placed to decide what skills the employees in the company had, this does not take away the fact that this was his subjective opinion and that not one of the individual applicants had any input in his subjective assessment.

[7] It should also be pointed out that Mr Human also effectively conceded that some employees were retrenched because their positions became redundant as a result of the purchase of a new machine and because of the downturn in consumer demand in the security gate department.

[8] The applicants closed their case without leading any evidence.

The issue before this Court

[9] As already pointed out, the issue before this Court is confined to the question whether the application of the selection criteria of “special skills” was applied fairly. This decision must be decided against the following background:

- (i) No agreement had been reached with the union or with the individual applicants as to what selection criteria would be applied. The employer unilaterally decided to apply “special skills” as opposed to a more objective selection criteria such as LIFO.
- (ii) No meeting was held with the union or with the individual applicants to discuss the application of the selection criteria of “special skills”.
- (iii) Mr Human subjectively decided which employees had the necessary special skills to fulfil certain tasks with no input whatsoever from the union and the affected employees. Mr Human therefore subjectively decided who should be retrenched and who should be retained.
- (iv) Mr Human conceded that in hindsight, the respondent should have consulted with the individual applicants when the decision regarding their skills was made.
- (v) Mr Human conceded that it was possible that his decision may have been influenced if he had afforded the individual applicants an opportunity to give some input.
- (vi) The respondent had made no effort whatsoever to contact the union after the meeting of 15 September 2011 for a period of approximately 1 ½ months. Even after the selection had been made the respondent still made no effort to engage the union or, at the very least, inform the individual applicants of the selection that had been made.

- (vii) When the applicants were eventually retrenched on 31 October 2010 they were not even informed as to why they were selected to be retrenched.
- (viii) On 31 October 2011 when the union arrived at the respondent's premises to continue with consultations, Mr Steenberg informed the union that 31 October 2011 was the date on which the retrenchment was implemented.

- [10] Is this fair? It is trite that although parties may agree that there is a need to retrench there still rests an obligation on the parties to consultation properly before a final decision to retrench is taken. It is especially important that consultation takes place in respect of the selection criteria as this would ultimately determine who will and who will not be retrenched.
- [11] It is common cause that no consensus seeking process was followed by the respondent in respect of the selection criteria and in respect of who should be selected to be retrenched. The excuse of the respondent was that it was waiting for the union to put forward its proposal. Although it is accepted that consultation is a joint consensus seeking process, the respondent's inaction in this particular case for more than a month can never be an excuse. The Labour Relations Act¹ places the primary obligation on the employer to ensure that an employee is not unfairly dismissed. This obligation implies that not only must the employer initiate the consultation process, the employer must also facilitate the conciliation process. The respondent failed dismally in this regard. At the very least the respondent ought to have contacted the union when it realised that no proposal was forthcoming and set up a meeting to discuss the selection of the employees. The employer not even made enquiries to the union as to why the so-called proposal was not forthcoming.
- [12] It is trite that consultation has a specific purpose in the context of a retrenchment. See in this regard the well-known decision of the Labour Appeal Court in *Johnson and Johnson (Pty) Ltd v CWIU*² where the Court emphasised the importance of a joint consensus-seeking process and the obligation of the employer:

¹ Act 66 of 1995.

² [1998] 12 BCLR 1209 (LAC).

[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); *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 (section 189(3)); it must allow the other 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 foiled 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 (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*, unreported case no J561/98 (LC) at paragraph 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.

[29] The important implication of this is that a mechanical, “checklist” kind of approach to determine whether section 189 has been complied with is inappropriate. The proper approach is to ascertain whether the purpose of the section (the occurrence of a joint consensus-seeking process) has been achieved (cf *Maharaj and others v Rampersad* 1964 (4) SA 638 (A) at 464; *Ceramic Industries Ltd t/a Betta Sanitaryware (supra)* at 701G–702H (BLLR);

676B–677C (ILJ); *Ex parte Mohuloe (Law Society Transvaal intervening)* 1996 (4) SA 1131 (T) at 1137H–1138D.”

- [13] I am not persuaded that the respondent had fulfilled its statutory obligation to consult. More in particular, the respondent has failed to persuade the Court that it had applied the selection criteria of “special skills” fairly: Firstly, apart from the say-so of Mr Human, nothing was placed before the Court to justify the selection of one employee over the other. The selection of the employees were not only subjectively but was extremely one-sided in the sense that the respondent did not even bother to engage any of the individual applicants for their input regarding his view about their skills. Secondly, the respondent was aware of the fact that the union was representing the individual applicants yet made no attempt to engage with the union even in circumstances where the union did not put forward any proposals. Thirdly, the document referred to during the trial which makes a comparison between those employees who were selected to be retrenched *vis à vis* those employees that were found to possess the necessary skills and therefore retained, was prepared shortly before the trial and was in fact prepared for trial purposes. Nothing was placed before this Court to show how the selection process actually took place despite the fact that Mr Human averred that he had prepared a schedule at the time.
- [14] The importance of consultation in respect of the selection of employees for retrenchment has also been emphasised Labour Appeal Court in *CWIU and others v Latex Surgical Products (Pty) Ltd*:³

“The selection criteria

[83] Section 189(2) of the Act deals with matters that are required to be the subjects of consultation when an employer contemplates the dismissal of one or more employees for operational requirements. One of these is provided for in section 189(2)(b). It is “the method for selecting the employees to be dismissed.” Section 189(5) requires the employer to allow the other consulting party an opportunity during consultation to make representations about any matter on which they are consulting. Section 189(6) obliges the employer to “consider and respond to the representations made by the other consulting

³ [2006] 2 BLLR 142 (LAC)

party and, if the employer does not agree with them, the employer must state the reasons for disagreeing”.

[84] Section 189(7) makes provision for what happens at the end of the process of consultation. Where attempts at finding measures that would avoid the dismissal of employees have failed, the end of the consultation process is the selection of the employees to be dismissed and then, finally, the dismissal. With regard to what selection criteria an employer must use when selecting employees to be dismissed, counsel for the appellants submitted that, where the employer and the union have not agreed upon the selection criteria, the employer is obliged in terms of section 189(7)(b) to use fair and objective selection criteria. I agree. Section 189(7) of the Act contemplates two types of selection criteria that may be used in the selection of employees to be dismissed. The one type is provided for in section 189(7)(a) and the other in section 189(7)(b). Section 189(7)(a) and (b) read:

“(7) The employer must select employees to be dismissed according to selection criteria–

(a) that have been agreed to by the consulting parties;

(b) if no criteria have been agreed, criteria that are fair and objective.”

The type provided for in section 189(7)(a) is for a situation where the consulting parties have reached an agreement on the method of selection (selection criteria) to be used to select employees to be dismissed. The one provided for in section 189(7)(b) is for a situation where the parties have not reached an agreement on the method of selection to be used to select the employees to be dismissed. The two types of selection criteria can be referred to as the agreed selection criteria and the fair and objective selection criteria respectively. Obviously the agreed selection criteria are selection criteria that have been agreed upon between the consulting parties. The fair and objective selection criteria must be used where the selection criteria have not been agreed upon between the consulting parties. What section 189(7), therefore, means is that, where the consulting parties have agreed upon the selection criteria, the employer is obliged to use the agreed selection criteria to select the employees to be dismissed. Where there are no agreed selection criteria, the employer is obliged to use only fair and objective selection criteria to select the employees to be dismissed.

[85] An employer and a union are free to agree upon selection criteria that are or may be subjective. When the agreed selection criteria are subjective, the employer does not act unfairly in using such selection criteria to select the

employees to be dismissed. Indeed, he may be acting unfairly if he departed from the agreed selection criteria simply because they are or may be subjective or may include a certain element of subjectivity. If the agreed selection criteria are contained in a collective agreement, he may be acting in breach of a collective agreement if he departed from them. However, where the employer does not use agreed selection criteria to select the employees to be dismissed, he may not use selection criteria other than “fair and objective” selection criteria.

The effect of section 189(7) is therefore that, when the court deals with a dispute concerning a dismissal for operational requirements where the selection criteria used by the employer to select employees for dismissal are challenged, it must first determine whether the selection criteria used were agreed or not. If they were agreed, section 189(7)(a) applies. If they were not agreed, section 189(7)(b) applies.

[86] The rationale for this is that the use of agreed selection criteria will not produce a dispute about the fairness of such criteria whereas the use of selection criteria that have not been agreed upon has the potential to lead to dissatisfaction and disputes about such criteria. The whole idea of the consultation process required by section 189 before dismissals for operational requirements can be effected is fairness and the prevention of unnecessary disputes that could otherwise arise if such dismissals occurred without such a process. Obviously, there are many dismissals for operational requirements which do not produce dismissal disputes precisely because of the consultation process required by section 189 and there would be many disputes that would arise if such a process did not occur.

[87] In this matter the scenario was a section 189(7)(b) scenario because the parties had not agreed upon the selection criteria. Accordingly, it was not permissible for the respondent to use any selection criteria other than those that were “fair and objective” as required by section 189(7)(b) of the Act. The use of selection criteria that are not fair and objective in a section 189(7)(b) scenario – in other words where the selection criteria have not been agreed upon – renders a dismissal substantively unfair. The use of subjective selection criteria in a section 189(7)(a) scenario – that is where the selection criteria – have been

agreed upon does not render the dismissal unfair because, although the criteria are not objective, their use is, as it were, by mutual consent.⁴

[88] The use of subjective selection criteria where they have not been agreed upon can easily lead to abuse of such criteria. This would be the case where they are used to get rid of employees that the employer may view as unwanted but against whom it is unable to produce acceptable proof of unacceptable conduct. That is why the Act contemplates the use of subjective selection criteria only where the parties have reached agreement thereupon. In other words the policy behind the provisions of the Act is that there is a price to be paid by an employer if he wants to use subjective selection criteria in a retrenchment case. That price is to secure an agreement with the other consulting party about the use of such selection criteria. If an employer strikes such a deal, it can go ahead and use subjective selection criteria. However, if it does not strike a deal with the other consulting party on the use of such criteria, the price it pays for not reaching an agreement thereon is that it may not use subjective selection criteria to select employees to be dismissed, in such a case, it must use selection criteria that are “fair and objective” as required by section 189(7)(b) of the Act.”

[15] Employees also have the right to challenge their assessment – something that was not done in this case: *National Union of Metalworkers of SA on behalf of Members v Timken SA (Pty) Ltd*.⁵

“[26] In support of its argument the respondent relied on the case of *Engineering Industrial and Mining Workers Union and another v Starpack (Pty) Ltd* (1992) 13 ILJ 655 (IC), where the court held that productivity and conduct have been held to be fair selection criteria provided that the affected employees are given the opportunity to challenge the assessment. In the present instance the applicants were not afforded the opportunity to challenge the data used in arriving at the conclusion that the attendance records were negative and therefore influenced their scores in the assessment of whether or not they should be retrenched.

[27] It is generally accepted in retrenchment cases that LIFO is the most objective and fair criterion to use. This criterion need not be applied in those

⁴ Court’s emphasis.

⁵ (2009) 30 ILJ 2124 (LC).

cases where its application could result in loss of skills or disrupt the business operations. There was no evidence to that effect in the present instance.

[28] Where the selection of employees is based on factors such as attendance record, tardiness and performance, such employees should be given an opportunity to make representation against the negative conclusion that may be drawn against them as a result thereof.

[29] In the present instance the analysis of the selection criterion shows clearly, in my view, that it was subjectively based on the elements of discipline. The criterion excluded from its scope skills, qualifications, experience and long service. What is also clear is that even if it was to be found that the criterion itself was objective and fair, its application was clearly unfair.

[30] The duty to show that the criterion used was both objective and fair in its definition and application rests on the employer. It was therefore the duty of the respondent in the present instance to show that the exclusion of factors such as skills, qualifications, experience and long service did not result in unfairness to those selected for retrenchment as a result thereof. I have already indicated that once an employer successfully demonstrates that the criterion by its definition was fair, it then has to show that its implementation was also fair."

[16] In light of the fact that no consultation procedure whatsoever has been followed in respect of the selection criteria and the ultimate selection of the employees - prior to dismissing them, it is the finding of this Court that the dismissal was procedurally unfair. It is also the finding of this Court that the dismissal of the applicants was substantively unfair in that no consultations took place in respect of the selection of the individual applicants and in light of the fact that no input whatsoever was sought from the union and the individual applicants before selecting them for retrenchment. In fact, the individual applicants were not even informed on the day of their retrenchment why they were selected to be dismissed. Furthermore, no objective evidence was placed before this Court to assist the Court in deciding who ought to have been retrenched and who ought not to have been retrenched. It is simply not adequate for an employer to belatedly try and justify the selection of an

employee in Court years after the actual selection had taken place in circumstances where it had failed to involve the union and the individual applicants in the selection process.

Appropriate remedy

- [17] The respondent urged this Court not to reinstate the individual applicants in light of the financial position of the company. The individual applicants on the other hand insisted that they should be reinstated and that they have been prejudiced by their retrenchment. Mr Cartwright on behalf of the applicants was not unsympathetic to the financial plight of the company and submitted that if the Court is not inclined to award reinstatement with full retrospectivity in light of the fact that the retrenchment took place more than 3 years ago, the Court should consider limiting the retrospectivity of the reinstatement.
- [18] It is for the Court to consider what an appropriate remedy should be against the trite principle that reinstatement is the primary remedy where dismissal is found to be substantively fair. See in this regard the Constitutional Court's decision in *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and others* where the Court sets out what the role of the Courts are in considering an appropriate remedy:⁶

“Role of courts in ordering a just and equitable remedy

[26] After *Equity Aviation, supra*, there can be no doubt that reinstatement is the primary remedy in unfair dismissal disputes and that section 193(1)(a) of the LRA confers a discretion on the commissioner or court of first instance to determine the extent of retrospectivity of the reinstatement. In *Equity Aviation*, Nkabinde J stated:

“The ordinary meaning of the word ‘reinstate’ is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers’ employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and

⁶ [2010] 5 BLLR 465 (CC).

conditions that prevailed at the time of their dismissal. As the language of section 193(1)(a) indicates, the extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal. The court or arbitrator may thus decide the date from which the reinstatement will run, but may not order reinstatement from a date earlier than the date of dismissal. The ordinary meaning of the word 'reinstate' means that the reinstatement will not run from a date after the arbitration award. Ordinarily then, if a Commissioner of the CCMA orders the reinstatement of an employee that reinstatement will operate from the date of the award of the CCMA, unless the Commissioner decides to render the reinstatement retrospective. The fact that the dismissed employee has been without income during the period since his or her dismissal must, among other things, be taken into account in the exercise of the discretion, given that the employee's having been without income for that period was a direct result of the employer's conduct in dismissing him or her unfairly."¹⁸ (footnotes omitted).

- [19] I have taken into account the submissions on behalf of both parties and I have decided to limit the reinstatement of the individual employees to two years.
- [20] One individual applicant – Mr Sidney Nyathi - has since passed away. Mr Lucky Desmond Nyathi has been duly appointed as the executor of his estate. In respect of this applicant I award him 12 month's compensation.
- [21] Mr Ramohale is currently of pensionable age. He also sought compensation equal to 12 months remuneration.
- [22] In respect of cost, I can see no reasons why costs should not follow the result.

Order

- [23] In the event the following order is made:

23.1 The dismissal of the applicants was substantively and procedurally unfair.

23.2 The respondent is ordered to reinstate the individual applicants. The retrospectivity of the reinstatement is limited to two years.

23.3 The respondent is ordered to pay the estate of the deceased Mr Nyathi compensation in an amount equivalent to 12 months' salary.

23.4 The respondent is ordered to pay Mr Ramohale compensation in an amount equivalent to 12 months' salary.

23.5 The respondent is to pay the costs of the first applicant, the National Union of Metalworkers of South Africa.

AC Basson
Judge of the Labour Court

Appearances

For the Applicants : Mr D. Cartwright of David Cartwright attorneys

For the Respondent : Advocate EJ Steenkamp

Instructed by : Z De Lange Incorporated

LABOUR COURT