



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case number: JS837/11

In the matter between:

NATIONAL UNION OF METAL WORKERS

First Applicant

MMUTLE & SEVEN OTHERS

Second and Further Applicants

And

BEVCAN

Respondent

Heard: 19 December 2014

Delivered: 16 April 2015

JUDGMENT

Van der Merwe AJ

- [1] This is an application brought in terms of Rule 35(13) of the High Court Rules dealing with discovery of documents, in terms of which the Applicants seek an order for certain documentation alternatively information to be made available to them. The nature of the information required relates to the identity, the pay

rate, occupation and date of employment of certain employees in the Respondent's employ at the time of the retrenchment of the Second to further Applicants in this matter.

- [2] It is common cause that the pleadings in the case are closed, the Applicants having delivered their Statement of Claim on 10 October 2011 and the Respondent delivering its Statement of Defence on 25 October 2011.
- [3] The Respondent opposes the relief on a number of grounds. These include what appears to be an allegation that the Applicants require the information in order to finalise the Pre-trial Minute and that the Applicants are not entitled to this information for that purpose as demanding discovery before the pre-trial would be premature. I do not find any substance in this defence. The Pre-trial proceedings are incidental and finalisation of the Pre-trial Minute does not ultimately represent the reason for requiring the information sought by the Applicants. The Applicants make no such claim in the founding papers before Court; they merely mention that the Applicants' representatives, whilst preparing for a pre-trial, realised that the Respondent had not provided the information sought. Under ideal circumstances, the information would have been available to the Applicants and as such could indeed be incorporated in the pre-trial discussions and ultimately the Pre-trial Minute. As I mentioned, this issue is however peripheral.
- [4] The Respondent's second defence amounts to an attack on the Applicants' reliance on Section 189(3) of the Labour Relations Act (LRA) in substantiation of the relief claimed. This criticism seems to be directed at the Applicants' submissions made in argument relating to the information to be disclosed by the employer in terms of Section 189(3) of the LRA to any affected employees or their representatives. The criticism appears misplaced and overly technical at this stage of the proceedings.
- [5] The principles applicable to discovery are dealt with under Rule 35 of the Uniform Rules. Generally speaking, discovery is not allowed before the close of pleadings except with leave of the Court and a party may only be called upon to discover documents relating to any matter in question in the

proceedings. The phrase “relating to any matter in question” is given a wide interpretation and includes the requirement of relevance. (See Harms, *Civil Procedure in the Superior Courts*, at B-242 and the authorities referred to there).

- [6] Matters in question are determined from the pleadings. In determining therefore whether the Applicants are entitled to the relief sought, consideration must be given to the pleadings in the case rather than technical issues such as the exact stage of the proceedings. Ultimately, the objective of this application is to advance the Applicants' case to trial; whether or not the Pre-trial Minute had been finalised and signed is irrelevant. The issues in dispute are made clear by the pleadings. Moreover, in unfair dismissal disputes, once dismissal is accepted, the employer carries the onus to prove that the dismissal had been fair.
- [7] When regard is had to the pleadings in this case and specifically the Statement of Case at paragraph 36, the Second to further Applicants were retrenched despite the existence of a collective agreement which prevents bumping. The Respondent's response hereto was that the Respondent did not engage in bumping. (See paragraph 27 of the Statement of Defence).
- [8] At paragraph 38, the Applicants allege that: 'Immediately after the retrenchments, the apprentice can makers who had been recently employed were moved into the positions of the Second to Further Applicants', to which the Respondent replies at paragraph 28: 'It is admitted that the apprentice can makers had already qualified. Some of them were retained, albeit not at the Respondent's Rosslyn operation. Their skills and qualifications set them apart from the Second to Further Applicants'.
- [9] At paragraph 46, the Applicants allege that: 'Only one of the Second to Further Applicants worked on lines 1 and 3 and they were retrenched despite a collective agreement which contained a no-bumping clause.' At paragraph 35.2, the Respondent denies bumping of the Second to Further Applicants.
- [10] Finally, at paragraph 47 the Applicants allege that: 'The selection criteria used was unfair and that a number of volunteers for retrenchment were not

permitted to leave despite having lower qualification than the Second to Further Applicants'. The Respondent in turn provides a bare denial to this allegation, at paragraph 36 of its Statement of Defence.

- [11] Considering the pleadings, it is apparent that the identity and other information relating to the remaining employees are indeed relevant in the current proceedings. The claim, in material respects, is premised on allegations of an unfair selection criteria, bumping under circumstances where bumping is apparently disallowed in terms of a Collective Agreement, and thirdly, on allegations that the Respondent retained lower qualified employees. I find that the information required is *prima facie* relevant to the Applicants' case. The Respondent's defence that this is an inopportune time to order delivery of such information is without merit.
- [12] I am, however, mindful that the Applicants should not be allowed to embark on a fishing expedition in the conduct of their case. (See: *Immobili Retail Investments (Pty) Ltd and Others v ABSA Bank (Pty) Ltd and Others* [2009] JOL 24158 (GNP))
- [13] I do not consider, however, the application to be a fishing expedition. I do not find any indication of an indiscriminate, speculative or overly hopeful quest for information, probably irrelevant to the case. While it is true that, as the pleadings currently stand, the Applicants make no mention of LIFO, even though it is referred to in their heads of argument, the Applicants clearly and succinctly state the basis of their claim as well as the nature and extent of the information required to prove those allegations. The information required is clearly relevant to selection criteria. In terms of section 189(7) of the LRA, the employer must show that it dismissed the employees according to a selection criteria that was fair and objective.
- [14] The Respondent has provided little more than bare denials in relation to the allegations made. I find the Respondent's submission that the Applicants may subpoena the documentation misplaced under the circumstances. Discovery remains the preferred method of obtaining evidence *inter partes* and the

Applicants need not resort to Rule 32 of the Uniform Rules in order to address the matter of evidence.

[15] The information requested in the Rule 35 notice is limited to employees paid on a rate of pay as opposed to employees paid a monthly salary.

[16] As far as costs are concerned, I consider that costs should fairly follow the result in the main dispute.

[17] The following Order is therefore made:

17.1. The Respondent is ordered to comply with the Rule 35 notice of the Rules of the High Court dated the 16th of April 2013, within 20 days from the date of this order.

17.2. The costs of this Application are to be costs in the cause.

G Van der Merwe

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr David Cartwright of David Cartwright Attorneys

For the Respondent: Advocate M Van As

Instructed by: DLA Cliffe Dekker Hofmeyr